TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 61.

THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS OF THE STATE OF MICHIGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED JUNE 5, 1900.

(10,572.)

(18,572.)

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INDEX.

	Original.	Print.
Petition for certiorari	1	1
Exhibit A—Petition for mandamus	4	3
Exhibit A—Letter of commissioner of railroads to general manager G. R. & I. R'y Co., July 11, 1901	6	5
Exhibit B—Order to show cause	7	6
C—Answer of respondent	9	7
D—Proceedings on order to show cause	25	23
E—Demurrer to answer	28	26
F—Order that mandamus issue	29	27
Transcript from circuit court of Kent county	30	27
Petition for mandamus	30	27
Exhibit A—Letter of commissioner of railroads to general manager of G. R. & I. R'y Co., July 11, 1901	32	30
Order to show cause	33	30
Answer of respondent	35	31
Proceedings on order to show cause	51	47
Demurrer to answer	54	50
Order that mandamus issue	55	51

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 22, 1903.

	Original.	Print
Clerk's certificate	56	52
Writ of certiorari and return	57	52
Notice of issuance of writ of certiorari	58	53
Motion that case be heard as calendar cause	59	54
Statement of attorney general upon motion that case be heard as calendar cause	60	55
Order denying motion	61	55
Order submitting cause	62	56
Motion for leave to file amended demurrer	63	56
Amended demurrer	64	57
Notice of motion to amend	65	57
Statement on motion to amend	66	58
Objections to amendment of demurrer	67	58
Additional statement in support of motion to amend	68	59
Opinion	72	62
Judgment	76	65
Writ of error	77	65
Citation and service	79	66
Bond on writ of error	80	67
Assignment of errors	82	69
Clerk's certificate	95	76

1

(*Petition for Certiorari.*)

STATE OF MICHIGAN:

In the Supreme Court.

To the honorable supreme court of the State of Michigan:

Your petitioner, The Grand Rapids and Indiana Railway Company, respectfully shows:

1. That on the 13th day of July, 1901, Chase S. Osborn, commissioner of railroads of the State of Michigan, filed in the circuit court for the county of Kent, his petition, praying that a writ of mandamus issue against your petitioner as therein stated. That a copy of said petition is hereto annexed marked Exhibit A.

2. That on filing said petition and on the 13th day of July, 1901, an order that your petitioner show cause, was made by Hon. Alfred Wolcott, judge of the said circuit court. That a copy of said order marked Exhibit B is hereto annexed.

3. That by consent the proceeding was adjourned from July 26th to August 9th.

4. That on the 9th day of August, 1901, your petitioner filed in the said circuit court, its answer to the said petition of the commissioner of railroads. That a copy of said answer is annexed hereto marked Exhibit C.

5. That on the said 9th day of August on the filing of said answer, the further proceedings were had in said circuit court, as shown by the transcript by the official stenographer of said court of his notes of said proceeding. That a true copy of said transcript is annexed hereto marked Exhibit D.

2

6. That thereupon and on the 14th day of August, 1901, the attorney general of said State filed a demurrer to the answer of your petitioner. That a copy of said demurrer marked Exhibit E is annexed hereto.

7. That the said cause upon said petition, answer and demurrer was submitted to the court on briefs. That on the 25th day of September, 1901, the said circuit court made an order, which was dated as of the 9th day of September, that a peremptory writ of mandamus issue, directed to your petitioner. That a copy of the said order is annexed hereto marked Exhibit F.

8. Your petitioner respectfully avers, that the said circuit court for the county of Kent, in and by its said order entered on the 25th day of September, dated on the 9th of September, erred in finding, deciding, ordering and adjudging.

(1.) That the respondent in said proceeding, The Grand Rapids and Indiana Railway Company, now your petitioner, entered into a contract with the State of Michigan to carry passengers at the rate fixed in subdivision nine, section 9 of article III of the so-called general railroad law.

(2.) That the said demurrer interposed in said proceeding to your petitioner's answer, should be sustained.

(3.) That a peremptory writ of mandamus issue as prayed, directed to the said respondent in said proceeding, commanding it forthwith and thereafter to issue and cause to be issued tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, at the rate of two and one-half cents per mile for all distances exceeding five miles.

(4.) That the relator recover from the respondent in said proceeding his costs to be taxed.

9. Your petitioner further avers, that the said order dated September 9th is against the just and legal rights of this respondent and was made without authority of law and contrary to the law and deprives your petitioner of its rights under the Constitution of the United States and operates and will operate to deprive your petitioner of its property and of its just rights in and to its property, without due process of law, and deprives your petitioner of the right to charge and receive adequate and reasonable compensation for the use of its property and for carrying persons thereon, and imposes upon your petitioner a rate which is unreasonable, inadequate and unjust, and which will reduce its earnings to such an extent as to practically leave it no profit for the operation of its railroad, and will deprive your petitioner of reasonable earnings and compensation for the use of its property, and deprives your petitioner
3 of the equal protection of the laws, and is a regulation of commerce between the States, and that your petitioner is aggrieved by the said decision and order of the said circuit court dated September 9th, 1901.

That the statute of Michigan on which said order is based is in violation of the provisions in the Constitution of the United States, that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and which gives to Congress the power to regulate commerce among the several States.

10. Your petitioner therefore prays that a writ of certiorari may be issued out of and under the sea- of this honorable, court, directing the judges of the circuit court for the county of Kent and requiring them on or before a certain date named therein to certify to this court the records, proceedings, pleadings, orders and exhibits in said cause, and that the order of the said circuit court for the county of Kent, dated September 9th, 1901, be reversed, set aside and held void, and that a stay of proceedings and such further order be made by this honorable court as may seem proper.

THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY,
By T. J. O'BRIEN, *Its General Counsel.*

T. J. O'BRIEN,
Attorney for Petitioner.

STATE OF MICHIGAN, } ss:
County of Kent, }

T. J. O'Brien, being duly sworn, deposes and says that he is one of the directors and is the general counsel of The Grand Rapids and Indiana Railway Company, the petitioner in the foregoing petition; that deponent has read said petition and knows the contents thereof; that he was attorney for the petitioners in the proceedings in the circuit court for the county of Kent therein set forth; that he is authorized to sign the said petition for and in the name of the said petitioner, and that the foregoing petition is true in substance and in fact, as he verily believes.

T. J. O'BRIEN.

Subscribed and sworn to before me this 23rd day of October, A. D. 1901.

JAMES B. HOWARD,
Notary Public in and for Kent County, Michigan.

4 (A.) *Petition for Mandamus.*

STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

To the circuit court for the county of Kent:

Your petitioner, Chase S. Osborn, commissioner of railroads of the State of Michigan, acting for and in behalf of such State, respectfully shows:

1. That the Grand Rapids and Indiana Railway Company is a corporation organized and existing under the general railroad law of this State, being act No. 198 of the session laws of 1873, as amended, having been reincorporated thereunder in 1896, and owning and leasing and operating a line of road lying partly in the lower peninsula of the State of Michigan, and partly in the State of Indiana, for the transportation of freight and passengers; and that of its said line of road about 439.40 miles is in the State of Michigan, consisting of about 376.55 miles of road from the Indiana State line to Mackinaw City, Michigan, with branches owned by it, and 36.85 miles leased from the Muskegon, Grand Rapids and Indiana Railroad Company, and 26 miles leased from the Traverse City Railroad Company.

2. That under and by virtue of act No. 79 of the session laws of 1873, as amended, it became and was the duty of the said Grand Rapids and Indiana Railway Company, on or before the first day of April, A. D. 1901, to make and transmit to your petitioner as commissioner of railroads, at his office in Lansing, Michigan, a full and true statement under oath of the affairs of said corporation on the 31st day of December preceding. That in the performance of the duty imposed upon it by said act the said Grand Rapids and In-

diana Railway Company, did under the oath of its vice president and auditor, make and transmit to your petitioner, the commissioner of railroads of the State of Michigan, a statement of its affairs on the said 31st day of December, 1900, which was received on the 5th day of April, 1901; which said report and statement indicated and set forth (pages 14 and 15) the gross earnings of its passenger trains per mile of road operated as follows:

Main line and branches	$2,330.74
Leased or proprietary roads:	
Muskegon, Grand Rapids and Indiana R. R.	2,173.26
Traverse City railroad	1,088.52
Total passenger department earnings (per mile of road)...	2,243.24

3. That after the receiving of said report and statement, and upon the 11th day of July, 1901, your petitioner, acting under and by virtue of the authority and the duty imposed upon him by said subdivision ninth of section nine, of article 2 of the general railroad law of this State, as amended, by a notice in writing addressed to its general manager, J. H. P. Hughart, at Grand Rapids, Michigan, notified the said
5 Grand Rapids and Indiana Railway Company that as the gross earnings of its passenger trains per mile of road operated by it within this State exceeded the sum of two thousand dollars, it would thereafter be allowed and required to receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight 150 pounds, over any portion of the line of road operated by it in this State, a sum not to exceed two and one-half cents per mile for distances exceeding five miles; a copy of which said notice is hereto attached, marked Exhibit A and made a part of this petition.

4. That upon and after receiving said notice as aforesaid, it became, was and now is the legal duty of the said Grand Rapids and Indiana Railway Company to reduce its rate of fare over any and every portion of the line of road operated by it within the State of Michigan for the transportation of any passenger and his or her ordinary baggage not exceeding in weight 150 pounds, to two and one-half cents per mile for distances exceeding five miles, and to thereafter sell tickets to all persons applying therefor, and to transport any person and his or her ordinary baggage, not exceeding in weight 150 pounds, for distances exceeding five miles, at the said rate of two and one half cents per mile. That notwithstanding said notices and said legal duty imposed upon the said Grand Rapids and Indiana Railway Company thereby, it refused and neglected, and still continues to refuse and neglect, to transport passengers at the rate required by law; but charges and insists upon receiving the sum of three cents per mile for all distances for the transportation of passengers over the said line of road operated by it within this State.

That your petitioner has no other specific legal remedy, and can-

not have adequate legal relief without the aid of the people's writ of mandamus, by the interposition of this honorable court.

Your petitioner therefore prays that an order be entered compelling the said Grand Rapids and Indiana Railway Company to show cause why a peremptory writ of mandamus should not be issued, compelling it to comply with the provisions of said subdivision ninth of section 9 of article 2 of the general railroad law of this State, as amended by act No. 90 of the public acts of 1891, and to forthwith and hereafter issue and cause to be issued, tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in weight 150 pounds, at the rate of two and one-half cents per mile, for all distances exceeding five miles; and that such other and further order may be entered as to the court shall seem proper.

CHASE S. OSBORN,
By CHARLES H. CHAPMAN,
Deputy Commissioner of Railroads.

HORACE M. OREN,
Attorney General, for Petitioner.

6 STATE OF MICHIGAN, } ss:
County of Ingham, }

On this 12th day of July, 1901, personally appeared before me the undersigned, a notary public within and for said county, Charles H. Chapman, who made oath that he is deputy commissioner of railroads of the State of Michigan; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

ARTHUR N. FRAME,
Notary Public, Wayne Co., Mich.,
Acting in Ingham Co., Mich.

(EXHIBIT A TO PETITION OF RAILROAD COMMISSIONER.)

JULY 11, 1901.

Mr. J. H. P. Hughart, gen'l manager G. R. & I. R'y Co., Grand Rapids, Mich.

DEAR SIR: It is noticed by the annual report of your company for the year ending December 31, 1900, that on pages 14 and 15 of such report the total earnings of its passenger trains are given as $976,843.87, or $2,243.24 per mile of road. This brings the company under the provisions of section 6234, compiled laws of 1897, and requires that its rates of passenger fare be reduced to 2½ cents per mile. The statute provides that the compensation for transport-

ing any passenger and his or her ordinary baggage, not exceeding in weight 150 pounds, shall not exceed 2½ cents per mile, for all companies the gross earnings of whose passenger trains, as reported to the commissioner of railroads, equal or exceed $2,000 per mile. You will therefore please take notice that your company is hereby required to reduce its rates of passenger fares as required by law.

Very respectfully yours,

CHASE S. OSBORN,
Commissioner of Railroads.

7 (B.—*Order to Show Cause.*)

At a session of the circuit court for the county of Kent, held a the court room in the city of Grand Rapids, in said county, on the 13th day of July, in the year of our Lord one thousand nine hundred and one.

Present: Hon. Alfred Wolcott, circuit judge.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent.

On reading and filing the petition of the relator above named, and on motion of Horace M. Oren, attorney general of the State of Michigan, attorney for relator:

It is ordered that the respondent, The Grand Rapids and Indiana Railway Company do show cause to this court on the 26th day of July, 1901, why a peremptory writ of mandamus should not be issued out of and under the seal of this court, to compel it, the said Grand Rapids and Indiana Railway Company, to comply with the provisions of subdivision ninth of section 9 of article 2 of the general railroad law of this State, as amended by act No. 90 of the public acts of 1891, and to forthwith and hereafter issue and cause to be issued, tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in weight 150 pounds, at the rate of two and one-half cents per mile, for all distances exceeding five miles.

And it is further ordered that a certified copy of this order, together with a copy of the petition aforesaid, upon which this order is founded, be served on the said respondent, The Grand Rapids and Indiana Railway Company, at least ten days before the time herein limited for showing cause; and that a copy of the said respondent's affidavits or return in response to this order be served upon the relator's attorney at least three days prior to the time limited for showing cause.

ALFRED WOLCOTT,
Circuit Judge.

8 STATE OF MICHIGAN, } ss:
County of Kent, }

I, Connor H. Smith, clerk of the circuit court for the county of Kent, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript thereof and of the whole of said original order.

In testimony whereof, I have hereunto set my hand and [SEAL.] affixed the seal of said court at the city of Grand Rapids in said county, this 13th day of July, 1901.

CONNOR H. SMITH, *Clerk,*
By RALPH A. MOSHER, *Deputy.*

9 (C.—*Answer of Respondent.*)

STATE OF MICHIGAN:

In the Circuit Court for the County of Kent.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent.

Mandamus.

Answer of the respondent to the petition of the relator filed in said court and to the order to show cause.

The said relator having on the 13th day of July, 1901, filed in this court his petition, verified on the 12th day of July, 1901, praying that an order be entered compelling the said respondent to show cause why a peremptory writ of mandamus should not be issued compelling it to comply with the provisions of subdivision nine of section nine in article II of the general railroad law of said State, as amended by act number 90 of the public acts of 1891, and to forthwith and hereafter issue and cause to be issued tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, at the rate of two and one-half cents per mile, for all distances exceeding five miles, and said court having on the 13th day of July, 1901, on reading and filing said petition, made an order requiring this respondent to show cause to said court on the 26th day of July, 1901, why a peremptory writ of mandamus should not be issued, as prayed in said petition, the said respondent files this, its answer to said petition, and submits the same as showing sufficient cause why a writ of mandamus should not be issued as prayed by the relator.

I.

1. The entire constitutional and statute law of the State of Michigan on the subject of tolls and compensation, to be charged and received by railway companies, is contained in article XIX A of the constitution, and in section 9, subdivision ninth of article II of act 198 of the laws of 1873, entitled, "An act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this State," as amended by act 202 of the laws of 1889.

These provisions are as follows:

Constitution, article XIX A. "The legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State" (adopted 1870, took effect January 1st, 1871).

"SEC. 9. Every such corporation shall possess the general powers and be subject to the liabilities and restrictions following, that is to say:

Ninth. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, shall not exceed the following prices, viz.: For a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger trains, as reported to the commissioner of railroads for the year one thousand eight hundred and eighty-eight, equaled or exceeded the sum of three thousand dollars for each mile of road operated by said company, two cents per mile and for all companies the earnings of whose passenger trains reported as aforesaid, were over two thousand and less than three thousand dollars per mile of road operated by said company, two and a half cents per mile, and for all companies whose earnings reported as aforesaid were less than two thousand dollars per mile of road operated by said company, three cents per mile: Provided, that in future whenever the earnings of any company doing business in this State, as reported to the commissioner of railroads at the close of any year, shall increase so as to equal or exceed the sum of two thousand or three thousand dollars per mile of road operated by said company, then in such case companies shall thereafter, upon the notification of the commissioner of railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half, or two cents per mile as hereinbefore provided: Provided, that roads in the upper peninsula in which report as above provided passenger earnings exceeding three thousand dollars per mile, shall not charge to exceed three cents per mile, and roads reporting less than three thousand dollars per mile

hall be allowed to charge not to exceed four cents per mile: Provided further, that one thousand mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State or carrying on business partly within and partly without the limits of this State, at a price not exceeding twenty dollars in the lower peninsula and twenty-five dollars in the upper peninsula. Such one thousand mile tickets may be made non-transferable, but whenever required by the purchaser they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand mile ticket shall be forfeited to the railroad company. Each one thousand mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used."

The said section 9 in article II has been amended several times since 1889 in other subdivisions, but the ninth subdivision has not been changed since 1889 and now remains as then amended. It is the same statute referred to in the petition for mandamus in this proceeding as act 90 of 1891.

2. The supreme court of the State of Michigan is, under the constitution of the State, the highest court and the court of final resort in the State.

Two cases only have come before the supreme court of the State arising upon said statute: Wellman *vs.* The Chicago and Grand Trunk Railway Company, decided December 24, 1890, reported 83 Mich., 592, and The Commissioner of Railroads of the State of Michigan *vs.* The Wabash Railway Company, decided April 4, 1900, reported 123 Mich., 669, in which a supplementary opinion was filed March 26, 1901, reported 85 Northwestern Reporter, 466 and '7, Detroit Legal News, 748.

In these cases the supreme court of the State upheld this statute and construed it and enforced it against the respective railway companies above named.

In the Wellman case the supreme court of Michigan quoted, considered and construed the said constitutional and statutory provisions and decided that under said constitutional provision the legislature was the exclusive and final judge of what were reasonable maximum rates of charges for the transportation of passengers on all railroads in the State of Michigan, and that the action of the legislature of the State in fixing maximum rates of such charges was final and conclusive upon the companies and the courts and that the reasonableness of such rates as fixed by the act of the legislature was not subject to review or inquiry by the courts or else-

where, and that the companies were precluded from showing that such rates so fixed were unreasonable in any case.

3. The said constitutional provision and statute as so construed and enforced by the supreme court of the State is in violation of the provision in the Constitution of the United States in section 1 of article XIV of the amendments, that no State shall deprive any person of property without due process of law.

4. The said constitutional provision and statute in the laws of Michigan are in violation of the said provision in the Constitution of the United States and void under the decision of the Supreme Court of the United States in the case of The Chicago, Milwaukee and St. Paul Railway Company *vs.* The State of Minnesota (134 U. S., 418), in which the Supreme Court of the United States decided that the statute of the State of Minnesota under consideration in that case, as construed by the supreme court of Minnesota, conflicted with said provision in the Constitution of the United States, for the reason that it deprived the railway company, the party in said suit, "of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice," and that, "if a railway company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States, and in so far as it is thus deprived while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws," and that the issue of the peremptory writ of mandamus in that case by the supreme court of the State of Minnesota was unlawful because in violation of the Constitution of the United States.

5. The said constitutional provision and statute in the State of Michigan are in violation of the said provision in the Constitution of the United States, as construed, interpreted and enforced by the Supreme Court of the United States in the said Minnesota case and in other decision of said court forming part of the law of the land.

6. There is no difference or distinction in theory or principle between the act of the railway commission of Minnesota made final by the statute of Minnesota and condemned as unconstitutional by the Supreme Court of the United States in the said Minnesota case and the act of the legislature of the State of Michigan itself held to be final by the supreme court of the State of Michigan as aforesaid and the said act of the legislature of Michigan is as fully in violation of said provision in the Constitution of the United States as the said statute of Minnesota, which was condemned as unconstitutional by

the Supreme Court of the United States in said Minnesota case. The thing condemned was the assume- power to arbitrarily and finally fix rates without a hearing of the companies affected, not the mere method of the exercise of such power, whether by the legislature or by a commission appointed by act of the legislature.

13 The said statute in its terms and as construed by the supreme court of the State, imposes upon railway companies the said rate of two and one-half cents per mile for said transportation, arbitrarily and finally without any inquiry or proceeding to ascertain or determine whether such rate in any case is reasonable or not, and without any provision for such inquiry and without any opportunity for a company in any case to show that in fact such rate would be inadequate and unreasonable compensation for such transportation.

The courts of the State enforce said statute against railway companies, as the supreme court of the State did in said Wabash case by peremptory writ of mandamus, based upon the statute itself and a report by the company that the earnings of its passenger trains in any year exceeded $2,000 and did not exceed $3,000 per mile, and notice by the commissioner of railroads to the company to reduce its fares to two and one-half cents, and without any inquiry, trial or hearing as to the reasonableness of such rate as matter of fact in any case, and without any opportunity for the company in any case to show that such rate would be unreasonable.

The said statute and the said construction and effect given to it by the supreme court of the State and the enforcement thereof by the courts in the manner stated, is in violation of the provision in the Constitution of the United States in section 1 of article XIV of the amendments, that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

III.

This respondent avers that the said rate, two and one-half cents per mile for transporting passengers and their baggage, according to said statute, is and would be inadequate, unreasonable and unjust, and would not be adequate or reasonable compensation for such transportation upon the railroad of this respondent. That the enforcement of said rate upon this respondent would reduce its earnings to the extent of seventy five thousand dollars ($75,000) and upwards per year (computed upon the earnings of 1900), and would deprive it to said extent of moneys and income to which it would be fairly and reasonably entitled from the use of its property for the transportation of persons and their ordinary baggage.

That the said statute of the State of Michigan, as construed and enforced by the courts of said State as aforesaid, imposes said rate upon this respondent arbitrarily and finally without any trial, hearing or inquiry as to the reasonableness of said rate applied to the

business of this respondent, and without any opportunity for
14 this respondent to be heard and to show as it can and would show, if heard, that said rate would be inadequate and unreasonable compensation for said service, and without any provision in the law of the State for such hearing, and with this respondent precluded under said law, as construed by the courts, from being heard at all in the matter, and from showing that such rate would be inadequate, unreasonable and unjust when applied to the business of this respondent, and that the courts of the State, in enforcing and giving effect to said statute, if adhering to their decisions, would not consider the question whether or not such rate is or would be reasonable in any case, and would not hear this respondent on that question, and would not allow it to show that the said rate would be inadequate and unreasonable for such transportation upon its railroad.

That such enforcement of said rate upon this respondent in such manner and under such circumstances and conditions and with the effect herein stated, would be depriving this respondent of its property without due process of law, and would be a violation of the said provision of the Constitution *in* the United States, which forbids any State to deprive any person of property without due process of law.

IV.

That the said rate of two and one-half cents per mile for transporting passengers and their baggage, according to the terms of said statute, as construed by the supreme court of the State, would be an inadequate and unreasonable compensation to this respondent for said transportation.

1. It would reduce materially and to a great extent, and not less than seventy-five thousand dollars ($75,000) per year (computed on the business of 1900), the gross earnings of this respondent from the operation of its railroad, which do not now and have not at any time in the past, yielded to this respondent a fair income and profit upon the capital invested by this respondent in its railroad property, over and above the expense of operation, economically conducted.

2. Only part of the travel on the railroad of this respondent would be subject to the two and one-half cents per mile rate under said statute, if enforced, that is, local travel wholly within the State of Michigan, between points in said State. This travel requires to a considerable extent, special and expensive service in local trains. The cost of said service economically conducted is such that two and one-half cents per mile for transporting persons and their baggage therein, according to said statute, would be inadequate and unreasonable compensation for such service, and would in many instances be less than the actual cost of running the trains to afford such transportation.

The enforcement of said rate upon this respondent would be unreasonable and unjust and such enforcement arbitrarily and without inquiry or hearing, and without opportunity for this respondent

to show that the said rate would be inadequate and unreason-
15 able, would be to unjustly and unreasonably deprive this respondent of its said earnings and of reasonable compensation for said transportation, in violation of said provision in the Constitution of the United States, that no State shall deprive any person of property without due process of law.

V.

The said statute of Michigan, as construed by the supreme court of the State, operates as a regulation of commerce among States in violation of the provision in the Constitution of the United States, which vests in Congress entire and exclusive power to regulate commerce among the States (article I, section 8, clause 3).

This respondent is a corporation organized under the laws of the States of Michigan and Indiana. It owns and operates a railroad running from Fort Wayne, in the State of Indiana to the straits of Mackinaw, in the State of Michigan. Said railroad is an inter-state road, and this respondent is engaged in inter-state commerce and subject to the laws of the United States, regulating such commerce. A large part of the earnings of this company is derived from inter-state commerce, that is, from the transportation of persons and express matter and the United States mails on continuous trips upon its railroad, in both States, from points in Michigan to points in Indiana, and *vice versa*.

The supreme court of Michigan in the Wabash case (in the said opinion filed March 26th, 1901), decided that in determining what domestic fares shall be (that is the maximum of rates to be charged by companies tor transporting persons and their baaggage within the State of Michigan under said statute), the amount of interstate fares earned by that portion of the road lying within the State of Michigan must be included in the earnings to determin- the rates which the companies may charge under such statute.

The said statute of Michigan, so construed, is a regulation of inter-state commerce and a restriction upon such commerce in violation of said provision in the Constitution of the United States (article I, section 8, clause 3).

This respondent avers that excluding the so-called Michigan proportion of the earnings of its passenger trains in inter-state business, the earnings of its passenger trains in 1900 would be much less than $2,000 per mile of road operated.

VI.

This respondent avers that two and one-half cents per mile for the transportation of persons and their baggage, not exceeding one hundred and fifty pounds in weight for each person for all distances over five miles, upon the railroad of this respondent, would not be adequate or reasonable compensation for such transportation, and that the enforcement of such rate upon this respondent would be unreasonable and unjust, and would not allow this respondent sufficient compensation for such transportation.

16 Your petitioner prays that the court will in this proceeding order an issue of fact to be framed for the trial of this question, and that the decisions of the courts of this State holding that the said act of the legislature, expressed in said statute, is final and conclusive and precludes railway companies from being heard as to the reasonableness of the rates fixed by said act, be reconsidered, reheard and overruled, and that the question of the adequacy and reasonableness of the said rate for the transportation of persons and their baggage, as aforesaid upon the railroad of this respondent, be tried, heard and determined by the court in this proceeding, and if it be found and determined that such rate would not be adequate or reasonable for such transportation, that the petition herein filed be dismissed.

VII.

Answering the statements of fact in the petition for mandamus in this proceeding, this respondent respectfully shows:

1. This respondent is a railway corporation, organized under the general laws of the State of Michigan and Indiana.

2. It was incorporated and organized in 1896 as a new and independent company and not as the re-organization as stated in said petition of a former corporation.

3. In 1896 it acquired by purchase the property known as the Grand Rapids and Indiana railroad, theretofore owned and operated by another corporation, and this respondent then succeeded to all the property rights and all the franchises of the said former company, pertaining to said property.

4. The cost to this respondent of the property in August, 1896, was $15,278,700.

5. The said property consists of the main line of railroad, extending from Fort Wayne in the State of Indiana, northerly through the State of Indiana and the lower peninsula of the State of Michigan to Mackinaw City on the straits of Mackinaw. The length of said railroad is 366.59 miles, of which 53.11 miles are in the State of Indiana. There are connected with said main line and owned by your petitioner ten short branch lines, all in the State of Michigan, the total length of which is 63.07 — (3.94 miles thereof *was* built in 1900, but not operated that year). The railroad property owned by this respondent consists of the said main line and branch lines of railroad rights of way, road-bed, station grounds, station buildings and other appurtenances.

This respondent owns rolling stock and equipment for the operation of said railroad, consisting of locomotives, passenger cars, freight cars and other cars, the value of which is $1,452,750.

17 6. There is outstanding indebtedness in the form of bonds, secured by mortgages on said railroad property, to the amount of $9,337,000, created as follows:

October 1st, 1869, time of payment now extended to July 1st, 1941	$5,375,000 00
August 1st, 1896, bonds issued due October 1st, 1936	3,962,000 00
Total	$9,337,000 00

$4,455,000 of said debt due July 1st, 1941, bears interest at four and one-half per cent.; $920,000 of said debt, due July 1st, 1941, bears interest at three and one-half per cent., and the said debt due October 1st, 1936, bears interest at four per cent.

The total annual interest on said indebtedness is $391,155.

This respondent has operated in connection with its said railroad, two lines of railroad in the State of Michigan, namely: the Muskegon, Grand Rapids and Indiana railroad, extending from the city of Grand Rapids to the city of Muskegon in the State of Michigan, 36.85 miles; and the Traverse City railroad, extending from Walton to the city of Traverse City, a distance of twenty-six miles. This respondent has never leased said lines but has operated the same in connection with its own railroad under arrangements with the companies owning said two lines, by which this respondent has operated the same and turned over to the other companies the surplus of earnings, over and above operating expenses. This respondent has not at any time derived any net income or earnings from said two lines, or either of them.

7. The total earnings from the operation of the said railroad of this respondent, and the said Muskegon and Traverse City roads for the year 1900, *was* $2,862,069.36.

The surplus of earnings over and above operating expenses, interest on debt and other charges, were as follows:

Of the Grand Rapids and Indiana railroad	$83,475 11
Of the Muskegon road	3,095 89
Of the Traverse City road	4,220 54

The capital stock of this respondent, authorized by its charter and the articles of association is $6,000,000. There *has* been issued and *is* now outstanding and owned by diverse persons, $5,791,700 in 57,917 shares of one hundred dollars each.

8. The said total earnings aforesaid, include all earnings from passenger and freight traffic, as follows:

Freight	$1,722,408 85
Passenger fares	978,881 92
Express and baggage	57,477 11
United States mails	59,183 43
Miscellaneous	6,753 06
From telegraph companies	9,687 85
Rent of tracks, yards and terminals	13,214 30
Other rents	1,866 49
Other sources	12,596 35
Total	$2,862,069 36

18 9. The reduction of passenger fares to two and one-half cents per mile would reduce the passenger earnings of this respondent as nearly as can be computed, $78,489 per annum. The effect of this computed on the basis of the business of 1900 in which the earnings were greater than in any former year, would be to very nearly leave no surplus whatever and would practically make the stock of this respondent worthless.

10. That the said earnings of passenger trains are made up as follows:

(1) Main line and branches:

Passenger fares	$885,474 87
Express and baggage	50,002 47
U. S. mails	52,667 91
Other sources	5,763 94
Total	$993,909 19
Per mile of road (427.17 miles)	2,326 73

(2) Muskegon, Grand Rapids and Indiana railroad:

Passenger fares	$69,728 80
Express and baggage	4,527 53
U. S. mails	4,848 99
Other sources	979 40
Total	$80,084 72
Per mile of road (36.85 miles)	2,173 26

(3) Traverse City railroad:

Passenger fares	$23,678 25
Express and baggage	2,947 11
U. S. mails	1,666 53
Other sources	9 72
Total	$28,301 61
Per mile of road (26 miles)	1,088 52

The totals are as follows:

For the three roads:

Passenger fares	$978,881 92
Express and baggage	57,477 11
U. S. mails	59,183 43
Other sources	6,753 06
Total	$1,102,295 52
Per mile of road (490.02 miles)	2,249 49

11. That the figures given in the last paragraph are the earnings of the entire main line from Ft. Wayne to Mackinaw City and of the Muskegon and Traverse City roads; that all of the last two roads are in Michigan. That the Michigan earnings of the 19 main line, including the Michigan proportion of inter-state business based on mileage, *is* as follows:

Passenger fares	$773,512 94
Express and baggage	43,549 94
U. S. mails	45,940 94
Other sources	5,453 72
Total	$868,457 54
Per mile of road	2,330 74

12. That the item, "other sources" in the last two paragraphs, cover- check room charges and similar small items.

13. That the statements of fact in said petition are contained in paragraphs numbered 1, 2, 3 and 4.

As to paragraph 1, this respondent says that the facts as to its incorporation and railroad are not correctly stated therein, and that the facts are as herein stated.

As to paragraph 2, this respondent admits the matters therein stated, and says that the facts as to its earnings and the matters contained in said report are more fully stated herein than in said paragraph 2 in the petition. That the said report of this respondent was made upon a blank form prepared and sent to it by the commissioner of railroads.

As to the third paragraph, this respondent admits that the relator sent a notice as therein stated, but it denies that in so doing he was acting under or by virtue of any authority or duty imposed upon him by law.

As to paragraph 4, this respondent admits that it does insist upon receiving the sum of three cents per mile for the transportation of every passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, for all distances over and upon the railroad owned and operated by this respondent, excepting the sale of one thousand mile books or tickets, and excepting some special and excursion rates which are offered to all persons caring to avail themselves of such rates, without discrimination.

VII*a*.

That the said railroad was built and in operation before the first day of January, 1873. It was built and owned and operated until June, 1896, by the Grand Rapids and Indiana Railroad Company, a corporation organized under the laws of the States of Michigan and Indiana, in the year 1870. The said last named corporation, on the first day of August, 1884, made a mortgage upon said railroad property to secure its bonds duly issued to the amount of three million (3,000,000) dollars. The said railroad and its appurtenant

property was sold on the 10th day of June, 1896, under decrees of the circuit courts of the United States for the western district of Michigan, and for the district of Indiana, in foreclosure of said mortgage, and purchased by John C. Sims, who thereby became the owner of said property. Thereafter under section 2 in article I of said act 198 of the laws of 1873, the said John C. Sims, with
20 others who associated themselves with him, organized a corporation (this respondent) for the ownership and management of said railroad by a certificate duly signed by them on the 7th day of July, 1896, and recorded in the office of the secretary of state of the State of Michigan, on the 11th day of July, 1896, which certificate is as follows:

"To the honorable secretary of state of the State of Michigan:

Whereas, on the first day of August, A. D. 1884, the Grand Rapids and Indiana Railroad Company, being then a corporation existing under the laws of the States of Indiana and Michigan, formed by the consolidation of certain other railroad companies, under the laws of said States respectively, was the owner of a certain railroad extending from the city of Fort Wayne, in the county of Allen, in the State of Indiana, thence through the counties of Allen, Dekalb, Noble and La Grange, in the State of Indiana, to the State line between Indiana and Michigan; thence northward through the counties of St. Joseph, Kalamazoo, Allegan, Kent, Montcalm, Mecosta, Osceola, Wexford, Grand Traverse, Kalkasak, Antrim, Otsego, Charlevoix and Emmet to Mackinaw City, in the State of Michigan, a total distance of about three hundred and sixty-six and fifty-nine hundredths (366.59) miles; fifty-three and eleven hundredths (53.11) miles of said railway being located in the State of Indiana and three hundred and thirteen and forty-eight hundredths (313.48) miles thereof being located in the State of Michigan, and

Whereas, on said first day of August, A. D. 1884, said railroad company executed a mortgage or deed of trust dated that day, to John E. Davidson, William H. Barnes and Conrad Baker, as trustees, conveying all the said railroad in the said States of Indiana and Michigan, which was known as the Grand Rapids and Indiana railroad, together with certain branches and extensions thereof and certain other lands, properties, rights and franchises, more particularly described hereafter; said mortgage or deed of trust including all the property between said terminal points, which said railroad company owned or possessed on the first day of August, 1884, or which it has since acquired, either in law or in equity, of every kind whatsoever appurtenant thereto; the object of said mortgage or deed of trust being to secure the payment of the principal and interest of the bonds of said Grand Rapids and Indiana Railroad Company, amounting to three million dollars, and

Whereas, afterwards, suits in equity were brought in the circuit courts of the United States for the western district of Michigan and for the district of Indiana, wherein John E. Davidson and William H. Barnes were complainants and the said Grand Rapids and Indiana

Railroad Company and others were defendants, for the pur-
21 pose of procuring a decree of foreclosure upon said mortgage or deed of trust and such proceedings were had in each of said courts, that upon the original bills and answers thereto, and upon the report of the master in chancery, to whom said suits were referred, for the purpose of finding and reporting upon the facts in said suits, a final decree was rendered by the said circuit court of the United States for the western district of Michigan, and also by the said circuit court of the United States for the district of Indiana, the decree of the former court being entered on the 7th day of March, A. D. 1896; and that of the latter court on the 12th day of March, A. D. 1896; and in and by said decrees it was ordered, adjudged and decreed that the said mortgage should be foreclosed and that the property therein mentioned should be sold as an entirety, and in the said decrees the property thereby ordered to be sold was describe- as follows, to-wit:

All and singular the railroad of the Grand Rapids and Indiana Railroad Company, which is known as the Grand Rapids and Indiana railroad, extending from the city of Fort Wayne in Allen county, in the State of Indiana, by way of Grand Rapids in the State of Michigan, to the waters of the straits of Mackinaw, in the village of Mackinaw City, in said State of Michigan, including the dock at the terminus of said railroad, and including also the frontage and the land out into the deep waters of the straits of Mackinaw, being a distance of 366 miles, more or less; including also the Missaukie branch, which extends from Missaukie on the main line, in the county of Wexford, northeasterly to a point near Falmouth, a distance of about eighteen miles, together with the equipment and franchises thereunto belonging or in anywise appertaining, including the roadbed of said railroad and branch, and all the tracks, side-tracks, spur tracks, rights of way, bridges, viaducts, culverts, fences, depots, station grounds, station houses, freight houses, wood houses, machine and other shops, telegraph lines and equipment, and all other structures, buildings and materials whatsoever placed and to be placed on the said rai-road or branch, or any part thereof; and also all locomotives, tenders, passenger, baggage, freight and other cars, and all rolling stock whatsoever heretofore acquired or which at the time of the sale hereunder shall have been acquired by the said Grand Rapids and Indiana Railroad Company for use upon, or in connection with, the said railroad or any part thereof; and also all depot grounds and other lands heretofore acquired, or which at the date of the sale may have been acquired for use in connection with the said railroad and branch, or in the operation thereof; together with all and singular the tenements, property and appurtenances of said railroad and corporation and the rights, privileges and franchises thereunto belonging or in any wise appertaining; and also all the estate, right, title, interest, income and prop-
erty, possession, claims and demands whatsoever, as well at law
22 as in equity, of the said Grand Rapids and Indiana Railroad Company, in, about and concerning the same, and each and

every parcel thereof; also the railroad known as the Bay View, Little Traverse and Mackinaw railroad, extending from near Bay View, in Emmet county, Michigan, in a northerly direction, and terminating at the village of Harbor Springs, in the said county of Emmet, together with all and singular the rights, property and franchises owned heretofore and belonging to the said Bay View, Little Traverse and Mackinaw Railroad Company, including any sidetracks, station houses, station buildings, telegraph line, water tanks, and other property, both real and personal, belonging to said railroad; also all the right, title and interest of the said Grand Rapids and Indiana Railroad Company in and to the Cincinnati, Richmond and Fort Wayne railroad, extending from a point near Fort Wayne, in the county of Allen, State of Indiana, to the city of Richmond, in said State, being a distance of about eighty-five miles, and in the lease or contract dated June 1st, 1871, between the said Grand Rapids and Indiana Railroad Company, the Cincinnati, Richmond and Ft. Wayne Railroad Company, the Cincinnati, Hamilton and Dayton Railroad Company, and the Pennsylvania Company, having reference to the lease and operation of said Cincinnati, Richmond and Fort Wayne railroad by the Grand Rapids and Indiana Railroad Company for the period of ninety-nine years; also, all and sin*u*lar the right, title and interest of the said Grand Rapids and Indiana Railroad Company in and to the railroad known as the Traverse City railroad extending from Walton Junction on the line of the said Grand Rapids and Indiana railroad to Traverse City, in Grand Traverse county, in said State of Michigan, a distance of about twenty-six miles, and in the lease dated January 1st, 1883, made by the said Traverse City Railroad Company to the defendant, The Grand Rapids and Indiana Railroad Company, for the possession and operation of said Traverse City railroad from the date of said agreement until the 1st day of January, 1933.

Including also all the material and supplies belonging to said Grand Rapids and Indiana Railroad Company and on hand at the date of sale used and partly used. Also any balance that may be found due to the said defendant, The Grand Rapids and Indiana Railroad Company on an adjustment between said company and connecting carriers over and above the amount which may be found due from said defendant company to other carriers, and

Whereas, afterwards, to-wit, on the 10th day of June, A. D. 1896, all the property hereinbefore described was sold at public sale, under and in pursuance of each of said final decrees of said courts, by John S. Lawrence, master in chancery, therein named, at which sale the undersigned, John C. Sims, became the purchaser of all said property, and said John C. Sims has since the date of said purchase, associated with himself the other persons whose names are
23 hereunto subscribed, all of whom desire and intend to form a corporation under the laws of the State of Michigan, as hereinafter more particularly set forth; and

Whereas, afterwards, to-wit, on the 2nd day of July, A. D. 1896, the said John S. Lawrence, master in chancery, did by deed exe-

cuted and dated on said day, convey to said John C. Sims, the entire railroad and all the property, franchises and appurtenances which were so sold by him to said John C. Sims, on said 10th day of June, A. D. 1896; the amount paid therefor by said John C. Sims being five hundred thousand dollars ($500,000);

Now, therefore, in pursuance of the statutes of the State of Michigan, in such case made and provided, and especially in pursuance of section two of an act entitled, "An act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations, owning or operating any railroad in this State;" the same being designated as No. 198 laws of 1873.

We whose names are hereunto subscribe-, do hereby form ourselves into a corporaiton, for the purpose of owning, maintaining and operating the railway and all other property hereinbefore described, and for this purpose, we do hereby declare and certify as follows:

1. The name of said new corporation shall be the Grand Rapids and Indiana Railway Company.

2. The number of directors of said corporation shall be seven.

3. The names of the first directors of said corporation are the following: James McCrea, Pittsburgh, Pa.; J. T. Brooks, Salem, Ohio; John E. Davidson, Pittsburgh, Pa.; Joseph Wood, Pittsburgh, Pa.; W. R. Shelby, Grand Rapids, Mich.; Harvey J. Hollister, Grand Rapids, Mich.; T. J. O'Brien, Grand Rapids, Mich.

4. The period of service of such directors shall be from the filing of this certificate in the office of the secretary of state of Michigan, until the first Wednesday of March, A. D. 1897, and thereafter directors shall be chosen annually on the first Wednesday of March, until otherwise provided in accordance with law.

5. The capital stock of the corporation hereby formed, shall be six million dollars ($6,000,000), consisting of sixty thousand (60,000) shares of the par value of one hundred dollars each, and the same shall be issued as follows:

To John C. Sims, fifty-nine thousand nine hundred and ninety-three (59,993) shares.

To James McCrea, one share; to J. T. Brooks, one share; to John E. Davidson, one share; to Joseph Wood, one share; to W. R. Shelby, one share; to Harvey J. Hollister, one share; to T. J. O'Brien, one share.

In testimony whereof, we have hereunto affixed our hands
24 and seals this 7th day of July, A. D. eighteen hundred and ninety-six.

J. C. SIMS.	[SEAL.]
JAMES McCREA.	[SEAL.]
J. T. BROOKS.	[SEAL.]
JOHN E. DAVIDSON.	[SEAL.]
T. J. O'BRIEN.	[SEAL.]
L. L. GILBERT.	[SEAL.]
S. C. SCOTT.	[SEAL.]

By virtue of the said certificate, this respondent became and now is duly incorporated, and the owner of said railroad property, and has since that date owned, possessed and operated the same.

VIII.

This respondent respectfully insists that it has the right to charge and receive the sum of three cents per mile for the transportation of every passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, for all distances upon and over its railroad.

IX.

For the reasons hereinbefore stated, this respondent respectfully prays that the petition in this proceeding be dismissed.

GRAND RAPIDS AND INDIANA RAILWAY CO.,
By R. R. METHEANY, *Auditor.*

T. J. O'BRIEN,
J. H. CAMPBELL,
Attorneys for Respondent.

STATE OF MICHIGAN, } ss:
County of Kent, }

R. R. Metheany, being duly sworn, deposes and says that he resides in the city of Grand Rapids, in the county of Kent, in the State of Michigan; that he is the auditor and secretary of The Grand Rapids and Indiana Railway Company, the respondent above named; that he is the accounting officer of said company, and as auditor, keeps the accounts of said company; that he has been such auditor for four years and upwards last past; that he has read the foregoing answer and knows the contents thereof, and that the matters therein stated are true as he verily believes.

R. R. METHEANY.

Subscribed and sworn to before me this ninth day of August, A. D. 1901.

JAMES B. HOWARD,
Notary Public in and for Kent County, Michigan.

25 (D.—*Proceedings on Order to Show Cause, August* 9, 1901.)

STATE OF MICHIGAN:

The Circuit Court for the County of Kent, May Term, 1901.

Before Hon. Alfred Wolcott, circuit judge.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY.

GRAND RAPIDS, MICHIGAN, FRIDAY, A. M., *August* 9, 1901.

(The petition and answer were here read.)

Mr. CAMPBELL: The first question in order, if your honor please, will be that presented by paragraph 6 in the petition and by paragraph 7. In going on I had assumed that we proceed with the hearing on the petition and on the answer.

Mr. OREN: Well, now, as bearing upon that, perhaps it would be well enough for us to make a statement of on what we rely, and possibly simplify it.

Mr. CAMPBELL: The question is whether there is any further pleading or any further statement to be filed.

Mr. OREN: Well, I will make a statement to the court. Now, may it please your honor, the issue that is sought to be raised by this answer is practically this: They say that by reason of a decision of our State supreme court, the opinion of Judge Morse in the Weldon case, that our supreme court has construed this act to shut off from the courts the consideration of the question as to whether, or not, the rate imposed is a reasonable rate; and they say that our State supreme court, having given that construction to the law, that under this decision of the United States court, and particularly this decision in the 134th United States, that our courts are giving this law an unconstitutional operation, and practically, if our State supreme court adheres to that construction of the law that the act itself would be unconstitutional.

Now, I will say in behalf of the State, that our examination of the authorities has led us to the conclusion (the reasons for which are very fully set out in detail in a brief we will file in this case), that this law cannot be given the operation that perhaps is intimated in this decision of our State supreme court in the Weldon case. I think the decisions of the United States Supreme Court are conclusive upon the fact that in legislation of this character it is impossible to debar the courts from passing finally upon the reasonableness or unreasonableness of the rates that are imposed, whether they are imposed by the legislature or by a commission. And we are
26 driven to the conclusion that unless there are some other controlling features in this case, that the court cannot do else, if

a replication is filed by us, then grant the issue and have a determination as to the facts as to whether or not this rate that is imposed by this act is reasonable. And were that feature alone in the case we would ask leave of the court at this time to file a replication and put in issue the facts which are stated here and relied upon by the respondent.

But I will say, your honor, that the view we take of the case is that there is another element in this case, which is more conclusive than the issue that is presented, that I have just referred to, and which we think is decisive of the case; and that point is this: It appears in the petition in this case that this corporation, the Grand Rapids and Indiana Railroad Company, was re-incorporated in 1896. This re-incorporation practically amounted to the creation of a new corporation, the terms of its charter being the provisions of our general railroad law, in which were found at this time, the time of the re-incorporation, these provisions relative to the rates that railroads organized under that act might be permitted to charge.

Now, it is the contention of the State in this case that by reason of this organization in 1896, when these provisions relative to maximum rates were in effect, that this corporation assumed contractoral relations with the State by which it assented to this scale of rates, and thereby precludes itself at any time thereafter of objecting when this law comes into operation, by reason of the earnings that are provided for and made the standard in this act. We say that if that proposition is based upon good law, that it makes no difference whether these rates are reasonable or unreasonable. They are the rates that the company contracted to perform these services at. They are bound by the terms of this law by reason of having organized under that act. And the various other questions that are raised in this proceeding, we claim that, by reason of this re-organization or incorporation in 1896, this company is precluded from raising.

In order to raise that single question which I think is decisive of the whole issue and includes all the others, in order that we may have that question determined, rather than go into a determination of the facts here, we would ask leave to file a demurrer to this answer alleging as our ground for demurrer the single point that I have raised here, namely, that by reason of this organization in 1896, this company is bound by the terms of our general railroad law, and particularly that provision relative to the scale that they shall be permitted to charge; and, that being true, that they are precluded from raising any other question in the case. Now, it would seem to me that that single question might be very readily raised by demurrer, and it would then be the sole question in the case and preclude the possibility of going into the other matters.

27 Mr. CAMPBELL: Of course the facts as to the incorporation of the respondent stated by the attorney general appear both in the petition and in the answer. A demurrer being filed, the first and the only question (until that is out of the way) to be considered is the demurrer.

Mr. OREN: I did not catch that.

Mr. CAMPBELL: The demurrer being filed, that is the first and only question to be determined.

Mr. OREN: Our idea in filing the demurrer, if we are defeated on that question, is that we are not precluded, according to the ordinary practice of the court, in later going into these other questions.

Mr. O'BRIEN: That entirely shifts the point made by the answer as anticipated. After filing your demurrer, you having made preparations on that point and we have not, I suppose we could fix a short time ahead to argue it or file briefs. You can file that instanter, I suppose.

Mr. OREN: Yes, we are prepared on that proposition.

Mr. O'BRIEN: We have not looked into that phase of the question, and if you will let us have your brief we will comply with it as soon as we can, either orally, or leave them with the court.

Mr. OREN: Well, suppose we take a week to exchange briefs in, giving us the privilege of putting in an answer-brief and submitting it in that form, if it would be satisfactory to the court.

The COURT: That would be all right, if that is the desire of the attorneys.

Mr. O'BRIEN: And let it be submitted on the brief.

Mr. OREN: Yes.

Mr. O'BRIEN: A week is a little bit short. I have just mapped out one week to be away, but I have no objection to a reasonable time.

Mr. CAMPBELL: Have you your brief prepared now to be submitted on this?

Mr. OREN: The brief that we have, of course, involves the other propositions in the case, but we can separate it.

Mr. O'BRIEN: The reference to some of your authorities would shorten our work, too.

Mr. OREN: I am not sure but what we might be able to detach the papers.

Mr. O'BRIEN: Suppose we have until the 20th.

Mr. OREN: Well, that is satisfactory.

The COURT: In which to furnish briefs.

Mr. O'BRIEN: We can furnish Mr. Oren the brief.

Mr. OREN: And we can have five days to reply.

Mr. CAMPBELL: You first give us your brief in support of the demurrer, which I understand you can do very soon.

Mr. OREN: We will give you a statement of our authorities right away.

The COURT: It is understood that leave may be given to file a demurrer which will be filed forthwith, I understand. The attorney general will furnish a memorandum of authorities on the
28 points raised in the demurrer; you will furnish your brief to him by the 20th of this month, and such reply brief as he desires will be furnished you by the 25th, and submitted to the court.

Mr. O'BRIEN: As I understand it, the attorney general has the affirmative of this issue that he now makes up.

The COURT: I suppose so.

Mr. O'BRIEN: And he will give us his brief very soon, within a day or two.

Mr. OREN: I can give you now a statement of our authorities and will, inside of two days, furnish it.

The COURT: It is understood it will be submitted on brief without further oral argument on the demurrer.

Mr. O'BRIEN: Yes, unless counsel should agree on the oral argument, or unless the court wishes it.

The COURT: If it is desirable to have oral arguments at any time and counsel agree on it, I suppose the court can arrange a time for hearing it.

STATE OF MICHIGAN, } ss:
County of Kent, }

I, Chas. H. Strawhecker, deputy official stenographer of the circuit court of the 17th judicial circuit, do hereby certify that the foregoing is a true and full transcript of the stenographic notes of the proceedings had in the cause therein entitled in said circuit court on the 9th day of August, A. D. 1901.

Grand Rapids, Mich., August 21, 1901.

CHAS. H. STRAWHECKER,
Deputy Stenographer.

(E.—*Demurrer.*)

STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY, Respondent.

Demurrer of the above named relator to the answer of the above named respondent.

And now comes the said relator and for cause of demurrer to the answer of the above named respondent, shows that the same is not sufficient in law for the reason,

That upon its incorporation in 1896 under the general railroad law, the said respondent entered into and became a party to a contract with the State of Michigan, one of the conditions of which was and is the agreement on the part of said respondent to carry all passengers at the rates fixed by subdivision ninth, section nine of article two of said general railroad law, under which it is incorporated.

HORACE M. OREN,
Attorney General.

Dated this 10th day of August, A. D. 1901.

I hereby certify that the foregoing demurrer is not interposed for delay, and that it is, in my opinion, well founded.

HORACE M. OREN,
Attorney General.

29 (F.—*Order of Circuit Court that Mandamus Issue.*)

STATE OF MICHIGAN:

At a session of the circuit court for the county of Kent, held at the court house, in the city of Grand Rapids, on the ninth day of September, in the year of our Lord one thousand nine hundred and one.

Present: The Honorable Alfred Wolcott, circuit judge.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent.

This cause having come on for hearing on the petition, answer and demurrer thereto, and the same having been argued by counsel and duly considered by the court, and it appearing that the respondent has by its incorporation under the general railroad law of the State of Michigan, entered into a contract with the State to carry passengers at the rate fixed in subdivision nine, section nine of article three of said general railroad law, and that therefore the demurrer interposed by the said relator should be sustained, therefore,

It is ordered and adjudged by the court that the said demurrer be sustained, and that a peremptory writ of mandamus issue as prayed, directed to the said respondent commanding it forthwith and hereafter — issue and cause to be issued tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage not exceeding in weight one hundred fifty pounds, at the rate of two and one-half cents per mile for all distances exceeding five miles.

It is further ordered and adjudged that the said relator recover from the respondent his costs to be taxed.

ALFRED WOLCOTT,
Circuit Judge.

30 (A.—*Petition for Mandamus.*)

STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

To the circuit court for the county of Kent:

Your petitioner, Chase S. Osborn, commissioner of railroads of the State of Michigan, acting for and in behalf of such State, respectfully shows:

1. That the Grand Rapids and Indiana Railway Company is a

corporation organized and existing under the general railroad law of this State, being act No. 198 of the session laws of 1873, as amended, having been reincorporated thereunder in 1896, and owning and leasing and operating a line of road lying partly in the lower peninsula of the State of Michigan, and partly in the State of Indiana, for the transportation of freight and passengers; and that of its said line of road about 439.40 miles is in the State of Michigan, consisting of about 376.55 miles of road from the Indiana State line to Mackinaw City, Michigan, with branches owned by it, and 36.85 miles leased from the Muskegon, Grand Rapids and Indiana Railroad Company, and 26 miles leased from the Traverse City Railroad Company.

2. That under and by virtue of act No. 79 of the session laws of 1873, as amended, it became and was the duty of the said Grand Rapids and Indiana Railway Company, on or before the first day of April, A. D. 1901, to make and transmit to your petitioner as commissioner of railroads, at his office in Lansing, Michigan, a full and true statement under oath of the affairs of said corporation on the 31st day of December preceding. That in the performance of the duty imposed upon it by said act the said Grand Rapids and Indiana Railway Company, did under the oath of its vice president and auditor, make and transmit to your petitioner, the commissioner of railroads of the State of Michigan, a statement of its affairs on the said 31st day of December, 1900, which was received on the 5th day of April, 1901; which said report and statement indicated and set forth (pages 14 and 15) the gross earnings of its passenger trains per mile of road operated as follows:

Main line and branches	$2,330.74
Leased or proprietary roads:	
Muskegon, Grand Rapids and Indiana R. R.	2,173.26
Traverse City railroad	1,088.52
Total passenger department earnings (per mile of road)	2,243.24

3. That after the receiving of said report and statement, and upon the 11th day of July, 1901, your petitioner, acting under and by virtue of the authority and the duty imposed upon him by said subdivision ninth of section nine, of article 2 of the general railroad law of this State, as amended, by a notice in writing addressed to its general manager, J. H. P. Hughart, at Grand Rapids, Michigan, notified the said
31 Grand Rapids and Indiana Railway Company that as the gross earnings of its passenger trains per mile of road operated by it within this State exceeded the sum of two thousand dollars, it would thereafter be allowed and required to receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight 150 pounds, over any portion of the line of road operated by it in this State, a sum not to exceed two and one-half cents per mile for distances exceeding five miles; a copy of

which said notice is hereto attached, marked Exhibit A and made a part of this petition.

4. That upon and after receiving said notice as aforesaid, it became, was and now is the legal duty of the said Grand Rapids and Indiana Railway Company to reduce its rate of fare over any and every portion of the line of road operated by it within the State of Michigan for the transportation of any passenger and his or her ordinary baggage not exceeding in weight 150 pounds, to two and one-half cents per mile for distances exceeding five miles, and to thereafter sell tickets to all persons applying therefor, and to transport any person and his or her ordinary baggage, not exceeding in weight 150 pounds, for distances exceeding five miles, at the said rate of two and one half cents per mile. That notwithstanding said notices and said legal duty imposed upon the said Grand Rapids and Indiana Railway Company thereby, it refused and neglected, and still continues to refuse and neglect, to transport passengers at the rate required by law; but charges and insists upon receiving the sum of three cents per mile for all distances for the transportation of passengers over the said line of road operated by it within this State.

That your petitioner has no other specific legal remedy, and cannot have adequate legal relief without the aid of the people's writ of mandamus, by the interposition of this honorable court.

Your petitioner therefore prays that an order be entered compelling the said Grand Rapids and Indiana Railway Company to show cause why a peremptory writ of mandamus should not be issued, compelling it to comply with the provisions of said subdivision ninth of section 9 of article 2 of the general railroad law of this State, as amended by act No. 90 of the public acts of 1891, and to forthwith and hereafter issue and cause to be issued, tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in
weight 150 pounds, at the rate of two and one-half cents per
32 mile, for all distances exceeding five miles; and that such other
and further order may be entered as to the court shall seem
proper.

CHASE S. OSBORN,
By CHARLES H. CHAPMAN,
Deputy Commissioner of Railroads.

HORACE M. OREN,
Attorney General, for Petitioner.

STATE OF MICHIGAN, } ss:
County of Ingham, }

On this 12th day of July, 1901, personally appeared before me the undersigned, a notary public within and for said county, Charles H. Chapman, who made oath that he is deputy commissioner of railroads of the State of Michigan; that he has read the foregoing petition and knows the contents thereof, and that the same is true of

his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

ARTHUR N. FRAME,
Notary Public, Wayne Co., Mich.,
Acting in Ingham Co., Mich.

(EXHIBIT A TO PETITION OF RAILROAD COMMISSIONER.)

JULY 11, 1901.

Mr. J. H. P. Hughart, gen'l manager G. R. & I. R'y Co., Grand Rapids, Mich.

DEAR SIR: It is noticed by the annual report of your company for the year ending December 31, 1900, that on pages 14 and 15 of such report the total earnings of its passenger trains are given as $976,843.87, or $2,243.24 per mile of road. This brings the company under the provisions of section 6234, Compiled Laws of 1897, and requires that its rates of passenger fare be reduced to 2½ cents per mile. The statute provides that the compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight 150 pounds, shall not exceed 2½ cents per mile, for all companies the gross earnings of whose passenger trains, as reported to the commissioner of railroads, equal or exceed $2,000 per mile. You will therefore please take notice that your company is hereby required to reduce its rates of passenger fares as required by law.

Very respectfully yours,

CHASE S. OSBORN,
Commissioner of Railroads.

33 (B.—*Order to Show Cause.*)

At a session of the circuit court for the county of Kent, held a the court room in the city of Grand Rapids, in said county, on the 13th day of July, in the year of our Lord one thousand nine hundred and one.

Present: Hon. Alfred Wolcott, circuit judge.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent.

On reading and filing the petition of the relator above named, and on motion of Horace M. Oren, attorney general of the State of Michigan, attorney for relator:

It is ordered that the respondent, The Grand Rapids and Indiana Railway Company do show cause to this court on the 26th day of July, 1901, why a peremptory writ of mandamus should not be issued out of and under the seal of this court, to compel it, the said Grand Rapids and Indiana Railway Company, to comply with the

provisions of subdivision ninth of section 9 of article 2 of the general railroad law of this State, as amended by act No. 90 of the public acts of 1891, and to forthwith and hereafter issue and cause to be issued, tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in weight 150 pounds, at the rate of two and one-half cents per mile, for all distances exceeding five miles.

And it is further ordered that a certified copy of this order, together with a copy of the petition aforesaid, upon which this order is founded, be served on the said respondent, The Grand Rapids and Indiana Railway Company, at least ten days before the time herein limited for showing cause; and that a copy of the said respondent's affidavits or return in response to this order be served upon the relator's attorney at least three days prior to the time limited for showing cause.

ALFRED WOLCOTT,
Circuit Judge.

34 STATE OF MICHIGAN, *County of Kent,* } ss:

I, Connor H. Smith, clerk of the circuit court for the county of Kent, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript thereof and of the whole of said original order.

In testimony, whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court at the city of Grand Rapids in said county, this 13th day of July, 1901.

CONNOR H. SMITH, *Clerk,*
By RALPH A. MOSHER, *Deputy.*

35 (C.—*Answer of Respondent.*)

STATE OF MICHIGAN:

In the Circuit Court for the County of Kent.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent.

Mandamus.

Answer of the respondent to the petition of the relator filed in said court and to the order to show cause.

The said relator having on the 13th day of July, 1901, filed in this court his petition, verified on the 12th day of July, 1901, praying that an order be entered compelling the said respondent to show

cause why a peremptory writ of mandamus should not be issued compelling it to comply with the provisions of subdivision nine of section nine in article II of the general railroad law of said State, as amended by act number 90 of the public acts of 1891, and to forthwith and hereafter issue and cause to be issued tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, at the rate of two and one-half cents per mile, for all distances exceeding five miles, and said court having on the 13th day of July, 1901, on reading and filing said petition, made an order requiring this respondent to show cause to said court on the 26th day of July, 1901, why a peremptory writ of mandamus should not be issued, as prayed in said petition, the said respondent files this, its answer to said petition, and submits the same as showing sufficient cause why a writ of mandamus should not be issued as prayed by the relator.

I.

1. The entire constitutional and statute law of the State of Michigan on the subject of tolls and compensation, to be charged and received by railway companies, is contained in article XIX A of the constitution, and in section 9, subdivision ninth of article II of act 198 of the laws of 1873, entitled, "An act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this State," as amended by act 202 of the laws of 1889.

These provisions are as follows:

Constitution, article XIX A. "The legislature may from
36 time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State" (adopted 1870, took effect January 1st, 1871).

"SEC. 9. Every such corporation shall possess the general powers and be subject to the liabilities and restrictions following, that is to say:

Ninth. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger and his or her ordinary baggage, nor exceeding in weight one hundred and fifty pounds, shall not exceed the following prices, viz: For a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger trains, as reported to the commissioner of railroads for the year one thousand eight hundred and eighty-eight, equaled or exceeded the sum of three thousand dollars for each mile of road operated by said company, two cents per mile and for all companies the earnings of whose passenger trains reported as aforesaid, were over two thousand and less than three thousand dollars per mile of

road operated by said company, two and a half cents per mile, and for all companies whose earnings reported as aforesaid were less than two thousand dollars per mile of road operated by said company, three cents per mile: Provided, that in future whenever the earnings of any company doing business in this State, as reported to the commissioner of railroads at the close of any year, shall increase so as to equal or exceed the sum of two thousand or three thousand dollars per mile of road operated by said company, then in such case companies shall thereafter, upon the notification of the commissioner of railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half, or two cents per mile as hereinbefore provided: Provided, that roads in the upper peninsula *in* which report as above provided passenger earnings exceeding three thousand dollars per mile, shall not charge to exceed three cents per mile, and roads reporting less than three thousand dollars per mile shall be allowed to charge not to exceed four cents per mile: Provided further, that one thousand mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State or carrying on business partly within and partly without the limits of this State, at a price not exceeding twenty dollars in the lower peninsula and twenty-five dollars in the upper peninsula. Such one thousand mile tickets may be made non-transferable, but whenever required by the purchaser they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket, and in case such ticket is presented by any
37 other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand mile ticket shall be forfeited to the railroad company. Each one thousand mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used."

The said section 9 in article II has been amended several times since 1889 in other subdivisions, but the ninth subdivision has not been changed since 1889, and now remains as then amended. It is the same statute referred to in the petition for mandamus in this proceeding as act 90 of 1891.

2. The supreme court of the State of Michigan is, under the constitution of the State, the highest court and the court of final resort in the State.

Two cases only have come before the supreme court of the State arising upon said statute: Wellman *vs.* The Chicago and Grand Trunk Railway Company, decided December 24, 1890, reported 83 Mich., 592, and The Commissioner of Railroads of the State of Michigan *vs.* The Wabash Railway Company, decided April 4, 1900, re-

ported 123 Mich., 669, in which a supplementary opinion was filed March 26, 1901, reported 85 Northwestern Reporter, 466 and '7, Detroit Legal News, 748.

In these cases the supreme court of the State upheld this statute and construed it and enforced it against the respective railway companies above named.

In the Wellman case the supreme court of Michigan, quoted, considered and construed the said constitutional and statutory provisions and decided that under said constitutional provision, the legislature was the exclusive and final judge of what were reasonable maximum rates of charges for the transportation of passengers on all railroads in the State of Michigan, and that the action of the legislature of the State in fixing maximum rates of such charges was final and conclusive upon the companies and the courts and that the reasonableness of such rates as fixed by the act of the legislature was not subject to review or inquiry by the courts or elsewhere, and that the companies were precluded from showing that such rates so fixed were unreasonable in any case.

3. The said constitutional provision and statute as so construed and enforced by the supreme court of the State, is in violation of the provision in the Constitution of the United States in section 1 of article XIV of the amendments, that no State shall deprive any person of property without due process of law.

4. The said constitutional provision and statute in the laws of Michigan are in violation of the said provision in the Constitution of the United States and void under the decision of the
38 Supreme Court of the United States in the case of The Chicago, Milwaukee and St. Paul Railway Company *vs.* The State of Minnesota (134 U. S., 418), in which the Supreme Court of the United States decided that the statute of the State of Minnesota under consideration in that case, as construed by the supreme court of Minnesota, conflicted with said provision in the Constitution of the United States, for the reason that it deprived the railway company, the party in said suit, "of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice," and that, "if a railway company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States, and in so far as it is thus deprived while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws," and that the issue of the peremptory writ of mandamus in that case by

the supreme court of the State of Minnesota was unlawful because in violation of the Constitution of the United States.

5. The said constitutional provision and statute in the State of Michigan are in violation of the said provision in the Constitution of the United States, as construed, interpreted and enforced by the Supreme Court of the United States in the said Minnesota case and in other decision- of said court forming part of the law of the land.

6. There is no difference or distinction in theory or principle between the act of the railway commission of Minnesota made final by the statute of Minnesota and condemned as unconstitutional by the Supreme Court of the United States in the said Minnesota case and the act of the legislature of the State of Michigan itself held to be final by the supreme court of the State of Michigan as aforesaid and the said act of the legislature of Michigan is as fully in violation of said provision in the Constitution of the United States as the said statute of Minnesota, which was condemned as unconstitutional by the Supreme Court of the United States in said Minnesota case. The thing condemned was the assume- power to arbitrarily and finally fix rates without a hearing of the companies affected, not the mere method of the exercise of such power, whether by the legislature or by a commission appointed by act of the legislature.

39 II.

The said statute in its terms and as construed by the supreme court of the State, imposes upon railway companies the said rate of two and one-half cents per mile for said transportation, arbitrarily and finally without any inquiry or proceeding to ascertain or determine whether such rate in any case is reasonable or not, and without any provision for such inquiry and without any opportunity for a company in any case to show that in fact such rate would be inadequate and unreasonable compensation for such transportation.

The courts of the State enforce said statute against railway companies, as the supreme court of the State did in said Wabash case by peremptory writ of mandamus, based upon the statute itself and a report by the company that the earnings of its passenger trains in any year exceeded $2,000 and did not exceed $3,000 per mile, and notice by the commissioner of railroads to the company to reduce its fares to two and one-half cents, and without any inquiry, trial or hearing as to the reasonableness of such rate as matter of fact in any case, and without any opportunity for the company in any case to show that such rate would be unreasonable.

The said statute and the said construction and effect given to it by the supreme court of the State and the enforcement thereof by the courts in the manner stated, is in violation of the provision in the Constitution of the United States in section 1 of article XIV of the amendments, that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

III.

This respondent avers that the said rate, two and one-half cents per mile for transporting passengers and their baggage, according to said statute, is and would be inadequate, unreasonable and unjust, and would not be adequate or reasonable compensation for such transportation upon the railroad of this respondent. That the enforcement of said rate upon this respondent would reduce its earnings to the extent of seventy five thousand dollars ($75,000) and upwards per year (computed upon the earnings of 1900), and would deprive it to said extent of moneys and income to which it would be fairly and reasonably entitled from the use of its property for the transportation of persons and their ordinary baggage.

That the said statute of the State of Michigan, as construed and enforced by the courts of said State as aforesaid, imposes said rate upon this respondent arbitrarily and finally without any trial, hearing or inquiry as to the reasonableness of said rate applied
40 to the business of this respondent, and without any opportunity for this respondent to be heard and to show as it can and would show, if heard, that said rate would be inadequate and unreasonable compensation for said service, and without any provision in the law of the State for such hearing, and with this respondent precluded under said law, as construed by the courts, from being heard at all in the matter, and from showing that such rate would be inadequate, unreasonable and unjust when applied to the business of this respondent, and that the courts of the State, in enforcing and giving effect to said statute, if adhering to their decisions, would not consider the question whether or not such rate is or would be reasonable in any case, and would not hear this respondent on that question, and would not allow it to show that the said rate would be inadequate and unreasonable for such transportation upon its railroad.

That such enforcement of said rate upon this respondent in such manner and under such circumstances and conditions and with the effect herein stated, would be depriving this respondent of its property without due process of law, and would be a violation of the said provision of the Constitution *in* the United States, which forbids any State to deprive any person of property without due process of law.

IV.

That the said rate of two and one-half cents per mile for transporting passengers and their baggage, according to the terms of said statute, as construed by the supreme court of the State, would be an inadequate and unreasonable compensation to this respondent for said transportation.

1. It would reduce materially and to a great extent, and not less than seventy-five thousand dollars ($75,000) per year (computed on the business of 1900), the gross earnings of this respondent from the operation of its railroad, which do not now and have not at any time in the past, yielded to this respondent a fair income and profit upon

the capital invested by this respondent in its railroad property, over and above the expense of operation, economically conducted.

2. Only part of the travel on the railroad of this respondent would be subject to the two and one-half cents per mile rate under said statute, if enforced, that is, local travel wholly within the State of Michigan, between points in said State. This travel requires to a considerable extent, special and expensive service in local trains. The cost of said service economically conducted is such that two and one-half cents per mile for transporting persons and their baggage therein, according to said statute, would be inadequate and unreasonable compensation for such service, and would in many instances be less than the actual cost of running the trains to afford such transportation.

The enforcement of said rate upon this respondent would be unreasonable and unjust and such enforcement arbitrarily and without inquiry or hearing, and without opportunity for this respondent to show that the said rate would be inadequate and unreasonable, would be to unjustly and unreasonably deprive this respondent of its said earnings and of reasonable compensation for said transportation, in violation of said provision in the Constitution of the United States, that no State shall deprive any person of property without due process of law.

41

V.

The said statute of Michigan, as construed by the supreme court of the State, operates as a regulation of commerce among States in violation of the provision in the Constitution of the United States, which vests in Congress entire and exclusive power to regulate commerce among the States (article I, section 8, clause 3).

This respondent is a corporation organized under the laws of the States of Michigan and Indiana. It owns and operates a railroad running from Fort Wayne, in the State of Indiana to the straits of Mackinaw, in the State of Michigan. Said railroad is an inter-state road, and this respondent is engaged in inter-state commerce and subject to the laws of the United States, regulating such commerce. A large part of the earnings of this company is derived from inter-state commerce, that is, from the transportation of persons and express matter and the United States mails on continuous trips upon its railroad, in both States, from points in Michigan to points in Indiana, and *vice versa*.

The supreme court of Michigan in the Wabash case (in the said opinion filed March 26th, 1901), decided that in determining what domestic fares shall be (that is the maximum of rates to be charged by companies for transporting persons and their baaggage within the State of Michigan uander said statute), the amount of interstate fares earned by that portion of the road lying within the State of Michigan must be included in the earnings to determin- the rates which the companies may charge under said statute.

The said statute of Michigan, so construed, is a regulation of inter-state commerce and a restriction upon such commerce in violation

of said provision in the Constitution of the United States (article I, section 8, clause 3).

This respondent avers that excluding the so-called Michigan proportion of the earnings of its passenger trains in inter-state business, the earnings of its passenger trains in 1900 would be much less than $2,000 per mile of road operated.

VI.

This respondent avers that two and one-half cents per mile for the transportation of persons and their baggage, not exceeding one hundred and fifty pounds in weight for each person for all distances over five miles, upon the railroad of this respondent, would not be adequate or reasonable compensation for such transportation,
42 and that the enforcement of such rate upon this respondent would be unreasonable and unjust, and would not allow this respondent sufficient compensation for such transportation.

Your petitioner prays that the court will in this proceeding order an issue of fact to be framed for the trial of this question, and that the decisions of the courts of this State holding that the said act of the legislature, expressed in said statute, is final and conclusive and preclu les railway companies from being heard as to the reasonableness of the rates fixed by said act, be reconsidered, reheard and overruled, and that the question of the adequacy and reasonableness of the said rate for the transportation of persons and their baggage, as aforesaid upon the railroad of this respondent, be tried, heard and determined by the court in this proceeding, and if it be found and determined that such rate would not be adequate or reasonable for such transportation, that the petition herein filed be dismissed.

VII.

Answering the statements of fact in the petition for mandamus in this proceeding, this respondent respectfully shows:

1. This respondent is a railway corporation, organized under the general laws of the State of Michigan and Indiana.

2. It was incorporated and organized in 1896 as a new an- independent company and not as the re-organization as stated in said petition of a former corporation.

3. In 1896 it acquired by purchase the property known as the Grand Rapids and Indiana railroad, theretofore owned and operated by another corporation, and this respondent then succeeded to all the property rights and all the franchises of the said former company, pertaining to said property.

4. The cost to this respondent of the property in August, 1896, was $15,278,700.

5. The said property consists of the main line of railroad, extending from Fort Wayne in the State of Indiana, northerly through the State of Indiana and the lower peninsula of the State of Michigan to Mackinaw City on the straits of Mackinaw. The length of said railroad is 366.59 miles, of which 53.11 miles are in the State

of Indiana. There are connected with said main line and owned by your petitioner ten short branch lines, all in the State of Michigan, the total length of which is 63.07 — (3.94 miles thereof *was* built in 1900, but not operated that year). The railroad property owned by this respondent consist- of the said main line and branch lines of railroad rights of way, road-bed, station grounds, station buildings and other appurtenances.

This respondent owns rolling stock and equipment for the operation of said railroad, consisting of locomotvies, passenger cars, freight cars and other cars, the value of which is $1,452,750.

43 6. There is outstanding indebtedness in the form of bonds, secured by mortgages on said railroad property, to the amount of $9,337,000, created as follows:

October 1st, 1869, time of payment now extended to July 1st, 1941	$5,375,000 00
August 1st, 1896, bonds issued due October 1st, 1936	3,962,000 00
Total	$9,337,000 00

$4,455,000 of said debt due July 1st, 1941, bears interest at four and one-half per cent.; $920,000 of said debt, due July 1st, 1941, bears interest at three and one-half per cent., and the said debt due October 1st, 1936, bears interest at four per cent.

The total annual interest on said indebtedness is $391,155.

This respondent has operated in connection with its said railroad, two lines of railroad in the State of Michigan, namely: the Muskegon, Grand Rapids and Indiana railroad, extending from the city of Grand Rapids to the city of Muskegon in the State of Michigan, 36.85 miles; and the Traverse City railroad, extending from Walton to the city of Traverse City, a distance of twenty-six miles. This respondent has never leased said lines but has operated the same in connection with its own railroad under arrangements with the companies owning said two lines, by which this respondent has operated the same and turned over to the other companies the surplus of earnings, over and above operating expenses. This respondent has not at any time derived any net income or earnings from said two lines, or either of them.

7. The total earnings from the operation of the said railroad of this respondent, and the said Muskegon and Traverse City roads for the year 1900, *was* $2,862,069.36.

The surplus of earnings over and above operating expenses, interest on debt and other charges, were as follows:

Of the Grand Rapids and Indiana railroad	$83,475 11
Of the Muskegon road	3,095 89
Of the Traverse City road	4,220 54

The capital stock of this respondent, authorized by its charter and the articles of association is $6,000,000. There *has* been issued and *is* now outstanding and owned by diverse persons, $5,791,700 in 57,917 shares of one hundred dollars each.

8. The said total earnings aforesaid, include all earnings from passenger and freight traffic, as follows:

Freight	$1,722,408 85
Passenger fares	978,881 92
Express and baggage	57,477 11
United States mails	59,183 43
Miscellaneous	6,753 06
From telegraph companies	9,687 85
Rent of tracks, yards and terminals	13,214 30
Other rents	1,866 49
Other sources	12,596 35
Total	$2,862,069 36

44 9. The reduction of passenger fares to two and one-half cents per mile would reduce the passenger earnings of this respondent as nearly as can be computed, $78,489 per annum. The effect of this computed on the basis of the business of 1900 in which the earnings were greater than in any former year, would be to very nearly leave no surplus whatever and would practically make the stock of this respondent worthless.

10. That the said earnings of passenger trains are made up as follows:

(1) Main line and branches:

Passenger fares	$885,474 87
Express and baggage	50,002 47
U. S. mails	52,667 91
Other sources	5,763 94
Total	$993,909 19
Per mile of road (427.17 miles)	2,326 73

(2) Muskegon, Grand Rapids and Indiana railroad:

Passenger fares	$69,728 80
Express and baggage	4,527 53
U. S. mails	4,848 99
Other sources	979 40
Total	$80,084 72
Per mile of road (36.85 miles)	2,173 26

(3) Traverse City railroad:

Passenger fares	$23,678 25
Express and baggage	2,947 11
U. S. mails	1,666 53
Other sources	9 72
Total	$28,301 61
Per mile of road (26 miles)	1,088 52

The totals are as follows:

For the three roads:

Passenger fares	$978,881 92
Express and baggage	57,477 11
U. S. mails	59,183 43
Other sources	6,753 06
Total	$1,102,295 52
Per mile of road (490.02 miles)	2,249 49

11. That the figures given in the last paragraph are the earnings of the entire main line from Ft. Wayne to Mackinaw City and of the Muskegon and Traverse City roads; that all of the last two roads are in Michigan. That the Michigan earnings of the
45 main line, including the Michigan proportion of inter-state business based on mileage, *is* as follows:

Passenger fares	$773,512 94
Express and baggage	43,549 94
U. S. mails	45,940 94
Other sources	5,453 72
Total	$868,457 54
Per mile of road	2,330 74

12. That the item, "other sources" in the last two paragraphs, cover- check room charges and similar small items.

13. That the statements of fact in said petition are contained in paragraphs numbered 1, 2, 3 and 4.

As to paragraph 1, this respondent says that the facts as to its incorporation and railroad are not correctly stated therein, and that the facts are as herein stated.

As to paragraph 2, this respondent admits the matters therein stated, and says that the facts as to its earnings and the matters contained in said report are more fully stated herein than in said paragraph 2 in the petition. That the said report of this respondent was made upon a blank form prepared and sent to it by the commissioner of railroads.

As to the third paragraph, this respondent admits that the relator sent a notice as therein stated, but it denies that in so doing he was acting under or by virtue of any authority or duty imposed upon him by law.

As to paragraph 4, this respondent admits that it does insist upon receiving the sum of three cents per mile for the transportation of every passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, for all distances over and upon the railroad owned and operated by this respondent, excepting the sale of one thousand mile books or tickets, and excepting some special and excursion rates which are offered to all persons caring to avail themselves of such rates, without discrimination.

VII*a*.

That the said railroad was built and in operation before the first day of January, 1873. It was built and owned and operated until June, 1896, by the Grand Rapids and Indiana Railroad Company, a corporation organized under the laws of the States of Michigan and Indiana, in the year 1870. The said last named corporation, on the first day of August, 1884, made a mortgage upon said railroad property to secure its bonds duly issued to the amount of three million (3,000,000) dollars. The said railroad and its appurtenant property was sold on the 10th day of June, 1896, under decrees of the circuit courts of the United States for the western district of Michigan, and for the district of Indiana, in foreclosure of said mortgage, and purchased by John C. Sims, who thereby became the owner of said property. Thereafter under section 2 in article I of said act 198 of the laws of 1873, the said John C. Sims, with
46 others who associated themselves with him, organized a corporation (this respondent) for the ownership and management of said railroad by a certificate duly signed by them on the 7th day of July, 1896, and recorded in the office of the secretary of state of the State of Michigan, on the 11th day of July, 1896, which certificate is as follows:

"To the honorable secretary of state of the State of Michigan:

Whereas, on the first day of August, A. D. 1884, the Grand Rapids and Indiana Railroad Company, being then a corporation existing under the laws of the States of Indiana and Michigan, formed by the consolidation of certain other railroad companies, under the laws of said States respectively, was the owner of a certain railroad extending from the city of Fort Wayne, in the county of Allen, in the State of Indiana, thence through the counties of Allen, Dekalb, Noble and La Grange, in the State of Indiana, to the State line between Indiana and Michigan; thence northward through the counties of St. Joseph, Kalamazoo, Allegan, Kent, Montcalm, Mecosta, Osceola, Wexford, Grand Traverse, Kalkasak, Antrim, Otsego, Charlevoix and Emmet to Mackinaw City, in the State of Michigan, a total distance of about three hundred and sixty-six and fifty-nine hundredths (366.59) miles; fifty-three and eleven hundredths (53.11) miles of said railway being located in the State of Indiana and three hundred and thirteen and forty-eight hundredths (313.48) miles thereof being located in the State of Michigan, and

Whereas, on said first day of August, A. D. 1884, said railroad company executed a mortgage or deed of trust dated that day, to John E. Davidson, William H. Barnes and Conrad Baker, as trustees, conveying all the said railroad in the said States of Indiana and Michigan, which was known as the Grand Rapids and Indiana railroad, together with certain branches and extensions thereof and certain other lands, properties, rights and franchises, more particularly described hereafter; said mortgage or deed of trust including all the property between said terminal points, which said railroad

company owned or possessed on the first day of August, 1884, or which it has since acquired, either in law or in equity, of every kind whatsoever appurtenant thereto; the object of said mortgage or deed of trust being to secure the payment of the principal and interest of the bonds of said Grand Rapids and Indiana Railroad Company, amounting to three million dollars, and

Whereas, afterwards, suits in equity were brought in the circuit courts of the United States for the western district of Michigan and for the district of Indiana, wherein John E. Davidson and William H. Barnes were complainants and the said Grand Rapids and Indiana Railroad Company and others were defendants, for the pur-
47 pose of procuring a decree of foreclosure upon said mortgage or deed of trust and such proceedings were had in each of said courts, that upon the original bills and answers thereto, and upon the report of the master in chancery, to whom said suits were referred, for the purpose of finding and reporting upon the facts in said suits, a final decree was rendered by the said circuit court of the United States for the western district of Michigan, and also by the said circuit court of the United States for the district of Indiana, the decree of the former court being entered on the 7th day of March, A. D. 1896; and that of the latter court on the 12th day of March, A. D. 1896; and in and by said decrees it was ordered, adjudged and decreed that the said mortgage should be foreclosed and that the property therein mentioned should be sold as an entirety, and in the said decrees the property thereby ordered to be sold was describe- as follows, to-wit:

All and singular the railroad of the Grand Rapids and Indiana Railroad Company, which is known as the Grand Rapids and Indiana railroad, extending from the city of Fort Wayne in Allen county, in the State of Indiana, by way of Grand Rapids in the State of Michigan, to the waters of the straits of Mackinaw, in the village of Mackinaw City, in said State of Michigan, including the dock at the terminus of said railroad, and including also the frontage and the land out into the deep waters of the straits of Mackinaw, being a distance of 366 miles, more or less; including also the Missaukie branch, which extends from Missaukie on the main line, in the county of Wexford, northeasterly to a point near Falmouth, a distance of about eighteen miles, together with the equipment and franchises thereunto belonging or in anywise appertaining, including the roadbed of said railroad and branch, and all the tracks, sidetracks, spur tracks, rights of way, bridges, viaducts, culverts, fences, depots, station grounds, station houses, freight houses, wood houses, machine and other shops, telegraph lines and equipment, and all other structures, buildings and materials whatsoever placed and to be placed on the said rai-road or branch, or any part thereof; and also all locomotives, tenders, passenger, baggage, freight and other cars, and all rolling stock whatsoever heretofore acquired or which at the time of the sale hereunder shall have been acquired by the said Grand Rapids and Indiana Railroad Company for use upon, or in connection with, the said railroad or any part thereof; and also

all depot grounds and other lands heretofore acquired, or which at the date of the sale may have been acquired for use in connection with the said railroad and branch, or in the operation thereof; together with all and singular the tenements, property and appurtenances of said railroad and corporation and the rights, privileges and franchises thereunto belonging or in any wise appertaining; and also all the estate, right, title, interest, income and property, possession, claims and demands whatsoever, as well at law
48 as in equity, of the said Grand Rapids and Indiana Railroad Company, in, about and concerning the same, and each and every parcel thereof; also the railroad known as the Bay View, Little Traverse and Mackinaw railroad, extending from near Bay View, in Emmet county, Michigan, in a northerly direction, and terminating at the village of Harbor Springs, in the said county of Emmet, together with all and singular the rights, property and franchises owned heretofore and belonging to the said Bay View, Little Traverse and Mackinaw Railroad Company, including any sidetracks, station houses, station buildings, telegraph line, water tanks, and other property, both real and personal, belonging to said railroad; also all the right, title and interest of the said Grand Rapids and Indiana Railroad Company in and to the Cincinnati, Richmond and Fort Wayne railroad, extending from a point near Fort Wayne, in the county of Allen, State of Indiana, to the city of Richmond, in said State, being a distance of about eighty-five miles, and in the lease or contract dated June 1st, 1871, between the said Grand Rapids and Indiana Railroad Company, the Cincinnati, Richmond and Ft. Wayne Railroad Company, the Cincinnati, Hamilton and Dayton Railroad Company, and the Pennsylvania Company, having reference to the lease and operation of said Cincinnati, Richmond and Fort Wayne railroad by the Grand Rapids and Indiana Railroad Company for the period of ninety-nine years; also, all and sin*ug*lar the right, title and interest of the said Grand Rapids and Indiana Railroad Company in and to the railroad known as the Traverse City railroad extending from Walton Junction on the line of the said Grand Rapids and Indiana railroad to Traverse City, in Grand Traverse county, in said State of Michigan, a distance of about twenty-six miles, and in the lease dated January 1st, 1883, made by the said Traverse City Railroad Company to the defendant, The Grand Rapids and Indiana Railroad Company, for the possession and operation of said Traverse City railroad from the date of said agreement until the 1st day of January, 1933.

Including also all the material and supplies belonging to said Grand Rapids and Indiana Railroad Company and on hand at the date of sale used and partly used. Also any balance that may be found due to the said defendant, The Grand Rapids and Indiana Railroad Company on an adjustment between said company and connecting carriers over and above the amount which may be found due from said defendant company to other carriers, and

Whereas, afterwards, to-wit, on the 10th day of June, A. D. 1896, all the property hereinbefore described was sold at public sale, under

and in pursuance of each of said final decrees of said courts, by John S. Lawrence, master in chancery, therein named, at which sale the undersigned, John C. Sims, became the purchaser of all said property, and said John C. Sims has since the date of said purchase, associated with himself the other persons whose names are
49 hereunto subscribed, all of whom desire and intend to form a corporation under the laws of the State of Michigan, as hereinafter more particularly set forth; and

Whereas, afterwards, to-wit, on the 2nd day of July, A. D. 1896, the said John S. Lawrence, master in chancery, did by deed executed and dated on said day, convey to said John C. Sims, the entire railroad and all the property, franchises and appurtenances which were so sold by him to said John C. Sims, on said 10th day of June, A. D. 1896; the amount paid therefor by said John C. Sims being five hundred thousand dollars ($500,000);

Now, therefore, in pursuance of the statutes of the State of Michigan, in such case made and provided, and especially in pursuance of section two of an act entitled, "An act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations, owning or operating any railroad in this State;" the same being designated as No. 198 laws of 1873.

We whose names are hereunto subscribe-, do hereby form ourselves into a corporaiton, for the purpose of owning, maintaining and operating the railway and all other property hereinbefore described, and for this purpose, we do hereby declare and certify as follows:

1. The name of said new corporation shall be the Grand Rapids and Indiana Railway Company.

2. The number of directors of said corporation shall be seven.

3. The names of the first directors of said corporation are the following: James McCrea, Pittsburgh, Pa.; J. T. Brooks, Salem, Ohio; John L. Davidson, Pittsburgh, Pa.; Joseph Wood, Pittsburgh, Pa.; W. R. Shelby, Grand Rapids, Mich.; Harvey J. Hollister, Grand Rapids, Mich.; T. J. O'Brien, Grand Rapids, Mich.

4. The period of service of such directors shall be from the filing of this certificate in the office of the secretary of state of Michigan, until the first Wednesday of March, A. D. 1897, and thereafter directors shall be chosen annually on the first Wednesday of March, until otherwise provided in accordance with law.

5. The capital stock of the corporation hereby formed, shall be six million dollars ($6,000,000), consisting of sixty thousand (60,000) shares of the par value of one hundred dollars each, and the same shall be issued as follows:

To John C. Sims, fifty-nine thousand nine hundred and ninety-three (59,993) shares.

To James McCrea, one share; to J. T. Brooks, one share; to John E. Davidson, one share; to Joseph Wood, one share; to W. R. Shelby, one share; to Harvey J. Hollister, one share; to T. J. O'Brien, one share.

In testimony whereof, we have hereunto affixed our hands
50 and seals this 7th day of July, A. D. eighteen hundred and ninety-six.

J. C. SIMS.	[SEAL.]
JAMES McCREA.	[SEAL.]
J. T. BROOKS.	[SEAL.]
JOHN E. DAVIDSON.	[SEAL.]
T. J. O'BRIEN.	[SEAL.]
L. L. GILBERT.	[SEAL.]
S. C. SCOTT.	[SEAL.]

By virtue of the said certificate, this respondent became and now is duly incorporated, and the owner of said railroad property, and has since that date owned, possessed and operated the same.

VIII.

This respondent respectfully insists that it has the right to charge and receive the sum of three cents per mile for the transportation of every passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, for all distances upon and over its railroad.

IX.

For the reasons hereinbefore stated, this respondent respectfully prays that the petition in this proceeding be dismissed.

GRAND RAPIDS AND INDIANA RAILWAY CO.,
By R. R. METHEANY, *Auditor.*

T. J. O'BRIEN,
J. H. CAMPBELL,
Attorneys for Respondent.

STATE OF MICHIGAN, *County of Kent,* } ss:

R. R. Metheany, being duly sworn, deposes and says that he resides in the city of Grand Rapids, in the county of Kent, in the State of Michigan; that he is the auditor and secretary of The Grand Rapids and Indiana Railway Company, the respondent above named; that he is the accounting officer of said company, and as auditor, keeps the accounts of said company; that he has been such auditor for four years and upwards last past; that he has read the foregoing answer and knows the contents thereof, and that the matters therein stated are true as he verily believes.

R. R. METHEANY.

Subscribed and sworn to before me this ninth day of August, A. D. 1901.

JAMES B. HOWARD,
Notary Public in and for Kent County, Michigan.

51 (D.—*Proceedings on Order to Show Cause, August* 9, 1901.)

STATE OF MICHIGAN:

The Circuit Court for the County of Kent, May Term, 1901.

Before Hon. Alfred Wolcott, circuit judge.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY.

GRAND RAPIDS, MICHIGAN, FRIDAY, A. M., *August* 9, 1901.

(The petition and answer were here read.)

Mr. CAMPBELL: The first question in order, if your honor please, will be that presented by paragraph 6 in the petition and by paragraph 7. In going on I had assumed that we proceed with the hearing on the petition and on the answer.

Mr. OREN: Well, now, as bearing upon that, perhaps it would be well enough for us to make a statement of on what we rely, and possibly simplify it.

Mr. CAMPBELL: The question is whether there is any further pleading or any further statement to be filed.

Mr. OREN: Well, I will make a statement to the court. Now, may it please your honor, the issue that is sought to be raised by this answer is practically this: They say that by reason of a decision of our State supreme court, the opinion of Judge Morse in the Welman case, that our supreme court has construed this act to shut off from the courts the consideration of the question as to whether, or not, the rate imposed is a reasonable rate; and they say that our State supreme court, having given that construction to the law, that under this decision of the United States court, and particularly this decision in the 134th United States, that our courts are giving this law an unconstitutional operation, and practically, if our State supreme court adheres to that construction of the law that the act itself would be unconstitutional.

Now, I will say in behalf of the State, that our examination of the authorities has led us to the conclusion (the reasons for which are very fully set out in detail in a brief we will file in this case), that this law cannot be given the operation that perhaps is intimated in this decision of our State supreme court in the Welman case. I think the decisions of the United States Supreme Court are conclusive upon the fact that in legislation of this character it is impossible to debar the courts from passing finally upon the reasonableness or unreasonableness of the rates that are imposed, whether they are imposed by the legislature or by a commission. And we are
52 driven to the conclusion that unless there are some other controlling features in this case, that the court cannot do else, if

a replication is filed by us, then grant the issue and have a determination as to the facts as to whether or not this rate that is imposed by this act is reasonable. And were that feature alone in the case we would ask leave of the court at this time to file a replication and put in issue the facts which are stated here and relied upon by the respondent.

But I will say, your honor, that the view we take of the case is that there is another element in this case, which is more conclusive than the issue that is presented, that I have just referred to, and which we think is decisive of the case; and that point is this: It appears in the petition in this case that this corporation, the Grand Rapids and Indiana Railroad Company, was re-incorporated in 1896. This re-incorporation practically amounted to the creation of a new corporation, the terms of its charter being the provisions of our general railroad law, in which were found at this time, the time of the re-incorporation, these provisions relative to the rates that railroads organized under that act might be permitted to charge.

Now, it is the contention of the State in this case that by reason of this organization in 1896, when these provisions relative to maximum rates were in effect, that this corporation assumed contractoral relations with the State by which it assented to this scale of rates, and thereby precludes itself at any time thereafter of objecting when this law comes into operation, by reason of the earnings that are provided for and made the standard in this act. We say that if that proposition is based upon good law, that it makes no difference whether these rates are reasonable or unreasonable. They are the rates that the company contracted to perform these services at. They are bound by the terms of this law by reason of having organized under that act. And the various other questions that are raised in this proceeding, we claim that, by reason of this re-organization or incorporation in 1896, this company is precluded from raising.

In order to raise that single question which I think is decisive of the whole issue and includes all the others, in order that we may have that question determined, rather than go into a determination of the facts here, we would ask leave to file a demurrer to this answer alleging as our ground for demurrer the single point that I have raised here, namely, that by reason of this organization in 1896, this company is bound by the terms of our general railroad law, and particularly that provision relative to the scale that they shall be permitted to charge; and, that being true, that they are precluded from raising any other question in the case. Now, it would seem to me that that single question might be very readily raised by demurrer, and it would then be the sole question in the case and preclude the possibility of going into the other matters.

53 Mr. CAMPBELL: Of course the facts as to the incorporation of the respondent stated by the attorney general appear both in the petition and in the answer. A demurrer being filed, the first and the only question (until that is out of the way) to be considered is the demurrer.

Mr. OREN: I did not catch that.

Mr. CAMPBELL: The demurrer being filed, that is the first and only question to be determined.

Mr. OREN: Our idea in filing the demurrer, if we are defeated on that question, is that we are not precluded, according to the ordinary practice of the court, in later going into these other questions.

Mr. O'BRIEN: That entirely shifts the point made by the answer as anticipated. After filing your demurrer, you having made preparations on that point and we have not, I suppose we could fix a short time ahead to argue it or file briefs. You can file that instanter, I suppose.

Mr. OREN: Yes, we are prepared on that proposition.

Mr. O'BRIEN: We have not looked into that phase of the question, and if you will let us have your brief we will comply with it as soon as we can, either orally, or leave them with the court.

Mr. OREN: Well, suppose we take a week to exchange briefs in, giving us the privilege of putting in an answer-brief and submitting it in that form, if it would be satisfactory to the court.

The COURT: That would be all right, if that is the desire of the attorneys.

Mr. O'BRIEN: And let it be submitted on the brief.

Mr. OREN: Yes.

Mr. O'BRIEN: A week is a little bit short. I have just mapped out one week to be away, but I have no objection to a reasonable time.

Mr. CAMPBELL: Have you your brief prepared now to be submitted on this?

Mr. OREN: The brief that we have, of course, involves the other propositions in the case, but we can separate it.

Mr. O'BRIEN: The reference to some of your authorities would shorten our work, too.

Mr. OREN: I am not sure but what we might be able to detach the papers.

Mr. O'BRIEN: Suppose we have until the 20th.

Mr. OREN: Well, that is satisfactory.

The COURT: In which to furnish briefs.

Mr. O'BRIEN: We can furnish Mr. Oren the brief.

Mr. OREN: And we can have five days to reply.

Mr. CAMPBELL: You first give us your brief in support of the demurrer, which I understand you can do very soon.

Mr. OREN: We will give you a statement of our authorities right away.

The COURT: It is understood that leave may be given to file a demurrer which will be filed forthwith, I understand. The attorney general will furnish a memorandum of authorities on the
54 points raised in the demurrer; you will furnish your brief to him by the 20th of this month, and such reply brief as he desires will be furnished you by the 25th, and submitted to the court.

Mr. O'BRIEN: As I understand it, the attorney general has the affirmative of this issue that he now makes up.

The COURT: I suppose so.

Mr. O'BRIEN: And he will give us his brief very soon, within a day or two.

Mr. OREN: I can give you now a statement of our authorities and will, inside of two days, furnish it.

The COURT: It is understood it will be submitted on brief without further oral argument on the demurrer.

Mr. O'BRIEN: Yes, unless counsel should agree on the oral argument, or unless the court wishes it.

The COURT: If it is desirable to have oral arguments at any time and counsel agree on it, I suppose the court can arrange a time for hearing it.

STATE OF MICHIGAN, } ss:
County of Kent, }

I, Chas. H. Strawhecker, deputy official stenographer of the circuit court of the 17th judicial circuit, do hereby certify that the foregoing is a true and full transcript of the stenographic notes of the proceedings had in the cause therein entitled in said circuit court on the 9th day of August, A. D. 1901.

Grand Rapids, Mich., August 21, 1901.

CHAS. H. STRAWHECKER,
Deputy Stenographer.

(E.—*Demurrer.*)

STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY, Respondent.

Demurrer of the above named relator to the answer of the above named respondent.

And now comes the said relator and for cause of demurrer to the answer of the above named respondent, shows that the same is not sufficient in law for the reason,

That upon its incorporation in 1896 under the general railroad law, the said respondent entered into and became a party to a contract with the State of Michigan, one of the conditions of which was and is the agreement on the part of said respondent to carry all passengers at the rates fixed by subdivision ninth, section nine of article two of said general railroad law, under which it is incorporated.

HORACE M. OREN,
Attorney General.

55 Dated this 10th day of August, A. D. 1901.

I hereby certify that the foregoing demurrer is not interposed for delay, and that it is, in my opinion, well founded.

HORACE M. OREN,
Attorney General.

(F.—*Order of Circuit Court that Mandamus Issue.*)

STATE OF MICHIGAN:

At a session of the circuit court for the county of Kent, held at the court house, in the city of Grand Rapids, on the ninth day of September, in the year of our Lord one thousand nine hundred and one,

Present: The Honorable Alfred Wolcott, circuit judge.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent.

This cause having come on for hearing on the petition, answer and demurrer thereto, and the same having been argued by counsel and duly considered by the court, and it appearing that the respondent has by its incorporation under the general railroad law of the State of Michigan, entered into a contract with the State to carry passengers at the rate fixed in subdivision nine, section nine of article three of said general railroad law, and that therefore the demurrer interposed by the said relator should be sustained, therefore,

It is ordered and adjudged by the court that the said demurrer be sustained, and that a peremptory writ of mandamus issue as prayed, directed to the said respondent commanding it forthwith and hereafter — issue and cause to be issued tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage not exceeding in weight one hundred fifty pounds, at the rate of two and one-half cents per mile for all distances exceeding five miles.

It is further ordered and adjudged that the said relator recover from the respondent his costs to be taxed.

ALFRED WOLCOTT,
Circuit Judge.

56 STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent.

COUNTY OF KENT, *ss:*

I, Connor H. Smith, clerk of the county and court aforesaid, do hereby certify that the above and foregoing are true and compared copies of the original petition, answer and other papers filed in this cause, and the rules and final judgment entered therein, and of the whole of said cause remaining on record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 7th day of November, A. D. 1901.

CONNOR H. SMITH, *Clerk*,
By RAYMOND PEARL, *Deputy*.

[Seal of the Circuit Court for the County of Kent.]

57 (*Writ of Certiorari.*)

In the name of the People of the State of Michigan.

[Seal of the Supreme Court of Michigan. Lansing.]

To the judges of the circuit court for the county of Kent:

We, being willing, for certain causes, that it should be certified to our supreme court what proceedings have been had before you, and what has been done by you in the matter of granting a peremptory writ of mandamus in a case pending in said circuit court wherein The Commissioner of Railroads of the State of Michigan is relator and The Grand Rapids and Indiana Railway Company is respondent.

Do, therefore, command you, that you distinctly and openly certify the records and proceedings in said matter to the said supreme court, before the justices thereof, that they may have them at the supreme court room, in the capitol, in the city of Lansing, on the fourteenth day of November, A. D. 1901, that said court may cause to be done thereupon what of right ought to be done, and have you then and there this writ.

Witness, the Honorable Robert M. Montgomery, chief justice of our supreme court, at Lansing, this fourth day of November, in the year of our Lord one thousand nine hundred and one.

CHAS. C. HOPKINS,
Clerk Supreme Court.

I hereby certify that the foregoing writ was duly allowed by Honorable Robert M. Montgomery, chief justice supreme court, and an order made that all proceedings under *of* order of circuit court be stayed, on the fourth day of November, 1901.

CHAS. C. HOPKINS, *Clerk.*

To the supreme court of Michigan:

The execution of the within writ appears by the transcript of record hereto annexed.

Nov. 7, 1901.

RAYMOND PEARL,
Deputy Clerk.

(Endorsed:) Filed Nov. 14, 1901. Chas. C. Hopkins, clerk supreme court.

58 STATE OF MICHIGAN:

In the Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY, Respondent.

SIR: Please take notice that the respondent in the above entitled case, has caused a writ of certiorari to be issued out of and under the seal of the supreme court of the State of Michigan, directed to the judges of the circuit court for the county of Kent. Said writ of certiorari is dated November 4th, 1901, and is returnable at the supreme court room in the city of Lansing on the 14th day of November, 1901. A copy of said writ is served on you herewith.

Yours, etc.

T. J. O'BRIEN,
Attorney for Appellant.

Dated November 5 1901.

To Hon. Horace M. Oren, attorney general.

STATE OF MICHIGAN, } ss:
County of Kent, }

Elizabeth A. Murphy being duly sworn deposes and says that on the 5th day of November 1901, she served a notice, of which the within is a true copy, upon Horace M. Oren, attorney general in the within entitled cause, by mail, by depositing the same in the United States postoffice in the city of Grand Rapids, in an envelope securely sealed, addressed "Hon. Horace M. Oren, attorney general, Lansing, Mich." with the postage thereon fully prepaid.

ELIZABETH A. MURPHY.

Subscribed and sworn to before me this 11th day of November, 1901.

JAMES B. HOWARD,
Notary Public, Kent County, Michigan.

[Endorsed:] No. 19043. Supreme court of the State of Michigan. Chase S. Osborn, commissioner, plaintiff and — *vs.* The G. R. & I. R'y Co. defendant and —. Proof of service of notice of the issuing of writ of certiorari. Filed Nov. 12 1901 Chas. C. Hopkins, clerk supreme court. T. J. O'Brien, attorney for appellant.

59 STATE OF MICHIGAN:

In the Supreme Court.

Certiorari to the Circuit Court for the County of Kent.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY, Respondent and Appellant.

Motion that Case be Heard as Calendar Cause.

The appellant respectfully moves the court for an order that the above entitled cause be heard in this court upon printed records and briefs and as a calendar cause, under the practice prescribed by rules 34 to 47 inclusive of this court.

This motion is founded on the provision of rule 12, (relating to cases upon certiorari to the circuit court in mandamus cases originating in the latter courts); that the cause may be noticed for hearing as a motion by either party on any motion day *unless otherwise ordered*, for the reasons: (1) The hearing of this case as a motion will be entirely inadequate for the convenient and proper consideration of the record and the questions arising thereon. (2) The extent of the record of this case requires that it shall be printed to enable the court to conveniently and properly consider it. (3) The argument of the case as a motion under the rule would be entirely inadequate for the proper presentation of the case and the points involved therein, to the court.

This motion is founded on the petition for writ of certiorari and the writ and the return thereto, which are in the files of this court in the case.

Dated November 14, 1901.

T. J. O'BRIEN,
Att'y for Appellant.

(Endorsed:) Filed November 16, 1901. Chas. C. Hopkins, clerk.

60 STATE OF MICHIGAN:

Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY, Respondent.

Statement of Attorney General upon Motion that Cause be Heard on Printed Record and Briefs and as a Calander Cause.

1. The record in this cause presnets but one question, a clear, clean-cut and simple question of law, viz: whether or not by its incorporation under the general railroad law of this State, in 1896, that law, and particularly the provisions therein fixing the rate of charge, became a contract between the Grand Rapids & Indiana Railway Company and the State of Michigan.

2. This question of law was carefully examined on both sides, and complete briefs filed, in the circuit court. The work of remodeling those briefs and making them more complete and extensive so as to fully cover the question presented, could be performed in ten days at the outside, and a sufficient time has elapsed since appellant has applied for its writ of certiorari to complete its brief.

3. The printing of the record in the case could be completed in three days at the utmost.

In view of the above facts there is no good reason for carrying the case over the term and placing it upon the January calendar in order that the same may be heard on printed record and briefs, and I therefore ask that the motion of the appellant be denied, and that the relator be permitted to notice the same as a motion, or that a day for hearing be fixed early in December.

Respectfully submitted,

HORACE M. OREN,
Attorney General.

(Endorsed:) Filed Nov. 16, 1901. Chas. C. Hopkins, clerk supreme court.

61 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the nineteenth day of November in the year of our Lord one thousand nine hundred and one.

Present: The Honorable Robert M. Montgomery, chief justice. Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

THE COMMISSIONER OF RAILROADS
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY. } No. 19043.

In this cause a motion is entered for an order making the case a docket case for the next regular term of this court, after due consid-

eration thereof by the court, the motion is denied with costs to the relator.

62 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the tenth day of December in the year of our Lord one thousand nine hundred and one.

Present: The Honorable Robert M. Montgomery, chief justice. Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

THE COMMISSIONER OF RAILROADS, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent and Appellant. } No. 19043.

This cause coming on to be heard is duly submitted on briefs.

63 STATE OF MICHIGAN:

Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILROAD COMPANY, Respondent.

And now comes the above named relator, Chase S. Osborn, commissioner of railroads by Horace M. Oren, attorney general, and moves the court for leave to file in said cause the amended demurrer hereto annexed.

The ground for this motion being, that, as said cause will probably be removed for review to the Supreme Court for the United States, it should affirmatively and specifically appear upon the face of the record that the provision contained in the general railroad law, fixing the rates of charge for the carriage of passengers (subdivision 9, section 9, article 2, general railroad law), is claimed, on the part of the State, to be a condition of the existence of the respondent, and of the enjoyment by it of the powers and privileges granted in the statute.

HORACE M. OREN,
Attorney General.

Dated this 17th day of December, A. D. 1901.

64 STATE OF MICHIGAN:

Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILROAD COMPANY, Respondent.

Amended Demurrer of the Above Named Relator to the Answer of the Above Named Respondent.

And now comes the said relator and for cause of demurrer to the answer of the above named respondent, shows that the same is not sufficient in law for the reasons

1. That upon its incorporation in 1896 under the general railroad law, the said respondent entered into and became a party to a contract with the State of Michigan, one of the conditions of which was and is the agreement on the part of said respondent to carry all passengers at the rates fixed by subdivision ninth, section nine of article two of said general railroad law, under which it is incorporated.

2. That upon its incorporation in 1896 under the general railroad law, the said respondent became subject to that law and the provision therein requiring it to carry passengers at the rates fixed in subdivision ninth, section nine of article two of that law, said provision in regard to rates being one of the conditions of the existence of respondent.

HORACE M. OREN,
Attorney General.

Dated December 17th, 1901.

I hereby certify that the foregoing demurrer is not interposed for delay, and that it is in my opinion well founded.

HORACE M. OREN,
Attorney General.

65 STATE OF MICHIGAN:

Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILROAD COMPANY, Respondent,

You will please take notice that the annexed and foregoing is a copy of a motion to amend the demurrer filed in the above entitled cause, which will be brought on for hearing on Tuesday, the 31st day of December, 1901, or as soon thereafter as counsel can be heard.

Yours, etc.,

HORACE M. OREN,
Attorney General.

To T. J. O'Brien, attorney for respondent. James H. Campbell, of counsel.

8—61

66 STATE OF MICHIGAN:

Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY, Respondent.

Statement on Motion to Amend Demurrer.

The cause for demurrer assigned in the original demurrer filed in this case, found in the record herein, (p. 41), has been believed and assumed by relator and his counsel to be sufficiently broad to raise the principal question.

1. That the respondent, by its incorporation in 1896 under the general railroad law, became a party to a contract with the State, and part of that contract being the agreement on the part of the railroad company to carry passengers at the rates fixed therein; and also the incidental question,

2. That the provision in regard to rates constituted one of the conditions of the existence of the respondent.

However, out of the abundance of caution, in view of the fact that this case will undoubtedly be taken to the Federal Supreme Court for review, it is desired that the demurrer specifically and directly raise both of these questions; hence this motion.

The precedent for making a motion of this character, at this time, will be found in the case of Osborn *v.* Wabash Railroad Co. 123 Mich. 669; and 85 N. W. 466, in which, after a decision of the case adverse to the respondent, it was permitted by this court, on motion of Mr. Alfred Russell, its attorney, to make an amendment to its answer filed in said cause in the circuit court.

Respectfully submitted.

HORACE M. OREN,
Attorney General.

(Endorsed:) Filed Dec. 20, 1901. Chas. C. Hopkins, clerk supreme court.

67 STATE OF MICHIGAN:

In the Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILROAD COMPANY, Respondent.

Objections by Respondent to Amendment to Relator's Demurrer.

The attorney general having given notice, dated December 17, 1901 of motion for leave to file the amended demurrer annexed to said motion; the said amendment consisting of an additional ground

of demurrer, to-wit: that upon its incorporation in 1896, under the general railroad law, the respondent became subject to that law and the provision therein requiring it to carry passengers at the rates fixed in subdivision 9 section 9 article II of that law; said provision being one of the conditions of the existence of respondent.

The said respondent objects to the allowance and making of such amendment. The grounds of this objection are:

1. This court has no power to allow the proposed amendment. The amendment proposed is not to supply any omission or error in the return. It proposes to change the issue made in the circuit court, upon which that court entered its judgment and to introduce a new ground of demurrer, which is substantially different from the ground of demurrer as filed in the circuit court.

2. If it shall be held that this court has the power to allow such amendment, the proposed amendment is one which this court, in the exercise of its discretion, should not allow to be made.

Dated December 27, 1901.

T. J. O'BRIEN,
Attorney for Respondent.

(Endorsed:) Filed December 28, 1901. Chas. C. Hopkins, clerk.

68 STATE OF MICHIGAN:

Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY, Respondent.

Additional Statement in Support of Motion for Leave to File Amended Demurrer.

This motion is opposed by counsel for respondent upon the ground, principally, that it imports a new and distinct issue into the case, which was not presented to or argued in the circuit court or heretofore in this court. The answer to this objection is that the amended demurrer does not and will not import into the case a new and distinct issue, as (*a*) the additional cause for demur assigned in the amended demurrer which we desire to file is included in the demurrer filed in the circuit court; (*b*) the additional cause for demur is and was supposed by relator to be in the case as embraced in the cause for demur assigned in the circuit court as incidental to the principal cause for demur, viz: that the respondent had entered into a contract with the State, and (*c*) the incidental question specifically raised in the amended demurrer sought to be filed is fully argued and presented in relator's briefs, and if the amendment is permitted no other or additional argument would be made.

The cause for demur assigned in the circuit court was,

"1. That upon its incorporation in 1896 under the general railroad law, the said respondent entered into and became a party to a

contract with the State of Michigan, one of the conditions of which was and is the agreement on the part of the said respondent to carry all passengers at the rates fixed by subdivision ninth, section nine, of article two of said general railroad law, under which it is incorporated."

The additional cause for demur now sought to be made is,

"2. That upon its incorporation in 1896 under the general railroad law, the said respondent became subject to that law and the provision therein requiring it to carry passengers at the rates fixed in subdivision ninth, section nine of article two of that law, said provision in regard to rates being one of the conditions of the existence of respondent."

There is a very little difference in the two propositions above made; in fact, there is no difference except in the form of expression. One is that because the respondent became incorporated under a general law of the State a provision of that law relating to rates becomes a condition of the contract, which by reason of the incorporation comes into existence between the corporation and the State. The other, that because the company is incorporated under a general law of the State a provision which that law contains becomes a condition of the existence of the company, and that it is bound thereby.

The additional cause for demur now sought to be included being embraced in the cause for demur assigned in the circuit court, the only reason for having the demurrer amended is that it will specifically and affirmatively set forth and call to the attention of this court, and that of the Federal Supreme Court, in case the proceeding is removed to that court, the proposition that a corporation by accepting the rights, powers and privileges and existence which the State grants becomes subject to the conditions which the State attaches to that existence, and that a provision in a general act for the incorporation of railroad companies which limits rates of charge to be made by such company is a condition of the existence of the company.

The term "contract" when used in reference to corporations and their relation to the State is what may be deemed a relative term, and does not necessarily convey the same meaning as would that word used in reference to an agreement between private individuals.

The term has come to be used, not from the identity of the character of the mutual relations which exist between a corporation and the State and the relations of contract between private individuals, but from the analogy of such relationship. Thus, the word "contract" as used in the Dartmouth College case and the kindred decisions in which a corporate charter is declared to be a contract means the relationship which exists between the corporation and the State, by reason of the rights granted to and duties and obligations imposed upon the corporation by the State, upon their acceptance by the corporation. Such is the meaning of the word "contract" as used in the original demurrer in this case. Such being the meaning, it necessarily includes within its terms the

additional cause for demur now filed, and that being the case, in permitting the filing of this amended demurrer this court is not importing a new issue into it.

One of the pertinent inquiries to be made by this court as a preliminary to the allowing of this amendment is whether its allowance will prejudice or injure the respondent. Clearly it will not and cannot do so. The question being embraced within the original cause for demur, it has been fully considered in the briefs filed, and if necessary respondent could be given permission to file an additional brief.

The statute governs the rights and duties of railroad companies, and determines the amount of fare which they should pay, and if this statute is a condition of the existence of the respondent, it is certainly not prejudiced by being required to comply therewith, and by being compelled to carry passengers at the rate therein fixed; and it should not be permitted, by the raising of technicalities or by a slight imperfection in the pleading, to refuse to comply with the statute or delay a proceeding instituted for the purpose of compelling it so to do.

The statute in terms requires respondent to carry passengers at a particular rate, viz: two and one-half cents per mile. It refuses so to do. This proceeding was instituted to compel a compliance with the statute. An order was entered in the circuit court requiring such compliance. Under such circumstances it can hardly be assumed that the only rights and equities existing are those which exist in favor of the respondent. The public certainly have
71 rights in the premises and should be carried at the rate fixed in the statute. The refusal to permit this amendment might, in case it be decided that the respondent has not entered into a contract with the State, but that the provision in regard to rates constitutes a condition of its existence, necessitate additional proceedings in the circuit court and would permit the respondent to continue to require from the travelling public one-half cent per mile more than it is entitled to, amounting in the neighborhood of seventy-five or one hundred thousand dollars a year, until the question could again be brought to this court upon proper pleadings and determined.

The authority of the court to permit this amendment is ample. The case before the court is a mandamus case, brought up on certiorari. Of mandamus cases this *case* has both original and appellate jurisdiction, and in this case its original jurisdiction was concurrent with that of the circuit court. The case before this court is in the same condition, substantially, as though this court had taken original jurisdiction of the cause, and as the jurisdiction of the court in mandamus is plenary, it would have plenary authority to permit the amendment in question.

For the reasons stated I submit that this court should permit the filing of the amended demurrer as moved.

Respectfully,

HORACE M. OREN,
Attorney General.

(Endorsed:) Filed Jan. 15, 1902. Chas. C. Hopkins, clerk supreme court.

72 *Opinion.*

Supreme Court of Michigan.

CHASE S. OSBORN, Commissioner of Railroads,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY.

This is certiorari to review proceedings of the circuit court, in which a mandamus was issued, requiring respondent to reduce its fare. It appears that the respondent was organized as a corporation on the fifteenth of July, 1896, under the railway law then in force, which, in part 9 of sec. 9, 2 Comp. Laws 1897, sec. 6234, fixes the rate of fare of railroad companies whose passenger trains earn more than two thousand dollars per mile, at two and one half cents per mile. The respondent comes within this provision.

The respondent company was organized, however, by purchasers of the property of the Grand Rapids & Indiana Railroad Company, on foreclosure of a mortgage given on the first day of August, 1884. At the time this mortgage was given, the only limitation on the power to fix rates of fare was that it should not exceed three cents per mile.

It is the respondent's contention that, under 2 Comp. Laws 1897, sec. 6224, being section 2 of the railway act, it succeeded to all the rights and privileges of the Grand Rapids & Indiana Railroad Company. The answer states that the rate of fare of two and one half cents per mile is unreasonable and inadequate, and, as this statement is admitted by demurrer to the answer, it is the respondent's contention that such a provision would be invalid as against the original railroad company, and that, as the respondent has succeeded to the rights of the railroad company, it is equally invalid as to it.

The contention that a statute fixing unreasonable rates would constitute an impairment of the property rights of the old company, is based upon numerous decisions of the Federal Supreme Court, and of this court. The subject was discussed in Smith *v.* L. S. & M. S. R'y Co., 114 Mich. 460, and the rule was recognized in both
73 opinions in that case, that legislation, the effect of which is to deprive a corporation of its property, cannot be sustained under the power to alter, amend or repeal. See, also, Att'y Gen'l *v.* Looker, 111 Mich. 498; Detroit *v.* Plank Road Co., 43 Mich. 140.

And that the fixing of unreasonable rates is an infringement of property rights of an existing corporation, within the meaning of the fourteenth amendment, appears to have been determined by the Federal Supreme Court in C. & G. T. R'y Co. *v.* Wellman, 143 U. S. 339; Reagan *v.* Farmer's Loan & Trust Co., 154 U. S. 362; Covington & Lexington Turnpike Road Co. *v.* Sanford, 164 U. S. 578; Chic., Mil., & St. P. R'y Co. *v.* Minnesota, 134 U. S. 418; and L. S. & M. S. R'y Co. *v.* Smith, 173 U. S. 684.

The question in this case, however, is whether the defendant corporation stands in the same position in this respect as would the original company have occupied, had there been no foreclosure. The briefs contain an elaborate discussion of the question as to how far and in what respect a charter or a law authorizing an incorporation is a contract. We do not find it necessary to discuss this question at length, for, in our view, it cannot admit of doubt that corporations formed under an existing law will not be heard to question the rates fixed by the statute. They cannot avail themselves of the provisions of the law which give them the right to do business, and disregard those provisions which are onerous. This was the view taken by this court in Jackson etc. Traction Co. *v.* Commissioner of Railroads, 87 N. W. Rep. 133, and has the support of authority in other jurisdictions. See Thompson on Corporations, sec. 5257, and cases cited.

The case turns upon the question of whether the respondent is in position to insist that it occupies precisely the same ground that the former corporation would, but for the foreclosure. 2 Comp. Laws 1897, sec. 6224, provides that, "in case of the foreclosure and sale of any railroad or any part of any railroad, under any trust deed or mortgage, * * * it shall be competent and lawful for the parties who may become purchasers and such others as they
74 may associate with themselves, to organize a corporation for the management of the same, and issue stock in the same in shares of one hundred dollars each, to represent the property in said railroad; *and such corporation, when organized, shall have the same rights, powers and privileges as are or may be secured to the original company, whose property may have been sold under and by virtue of such mortgage or trust deed.*"

The section then provides for a declaration or certificate of the purchasers at the sale, setting forth the description of the property, etc., the amount paid, and the stockholders to whom stock is to be issued, which shall be addressed to the secretary of state, and proceeds,—

"And being filed and recorded in his office, the said corporation shall become complete, *with all the powers and rights secured to railroad companies under this act, to all the provisions of which, and amendments thereto, it shall be subject.*"

When the mortgage in question was given, the section fixing the rates contained no limitation, except that they should not exceed three cents per mile.

It is contended that the legislature could not, by the amendment of 1889, enacted after the mortgage was made, withdraw from the bondholders the right to reorganize, except on condition of submitting to the rates fixed by the statute. This question would seem to depend upon whether the legislation affected the bondholders' remedy simply, or affected the right of property. It may be urged with some force that, if the legislature might prohibit any incorporation, except on the terms of acceptance of unreasonable rates, the bondholders would be remediless, and that the right to reorganize is, in

effect, a part of the mortgage contract, and that the rights and franchises of the debtor corporation vest in the purchaser, on reorganization. If this view be adopted, and particularly if it be said that the purchasers could not, except through the instrumentality of a corporation, conduct the business of the corporation, it would be difficult to say that the amendment affects the remedy merely. Its effect would be, under such construction, to cut off the remedy,
75 *pro tanto* at least; and, if the rates are so far unreasonable as to make the operation of the road a burden, the effect would be to cut off the remedy wholly, thus rendering the franchise valueless. This would be beyond the power of the legislature.

Mundy *v.* Munroe, 1 Mich. 68;
Cargill *v.* Power, 1 Mich. 369.

But is this the effect of the amendment? May it not be said that the rights and property of this corporation vested in the purchaser upon the foreclosure sale, and that, independent of any express statutory authority to operate, the purchaser was authorized to maintain his property rights, and to operate this railroad in accordance with the franchise of the original company, and under precisely the same conditions? If this be so, the authority to incorporate was not essentially a part of the property right, but was a privilege granted by the State, which might be withdrawn. This latter view is enforced by the fact that, under the constitution, the legislature possessed the power to alter, amend or repeal this statute; and by the further fact that, under section 2, as it has always existed, the right to reorganize by the purchaser at a foreclosure sale was limited by the provision that the corporation should be vested with the powers and rights secured to railroad companies under the act, *to all the provisions of which, and the amendments thereto, it should be subject.* More than this, the legislature possessed the power, under the constitution, to repeal the statute. It could do this one day before the reorganization, or the next day after. While, by this means, it could not cut off the mortgage, or divest the mortgagee of his property rights, it could deprive him of the *power of reorganization.*

We think the legislation was not unconstitutional, and the order of the circuit court is affirmed with costs.

R. M. MONTGOMERY.
C. B. GRANT.
J. B. MOORE.
FRANK A. HOOKER.

Long, J., did not sit.

(Endorsed:) Filed April 8, 1902. Chas. C. Hopkins, clerk supreme court.

76 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing on the eighth day of April in the year of our Lord one thousand nine hundred and two.

Present: The Honorable Frank A. Hooker, chief justice. Joseph B. Moore, Claudius B. Grant, Robert M. Montgomery, associate justices.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent and Appellant. } No. 19043.

The record and proceedings in this cause having been removed to this court by writ of certiorari, issued to the circuit court for the county of Kent, and motion having been made by said relator for leave to file an amended demurrer is said cause, and after having heard the respective parties in regard thereto, by their respective attorneys, and the said motion, and certiorari and matters and proceedings therein having been examined and duly considered by the court, and it appearing to this court that the said amendment should be permitted, and that there is no error in the rulings and proceedings in said cause in said circuit court, therefore, leave is granted to file the said amended demurrer in this cause, and it is ordered that the said amended demurrer tendered by the said relator, be and stand as the demurrer herein, in all respects as if the same had been originally filed in the circuit court in said cause. It is further ordered and adjudged by the court that the order of the said circuit court for the county of Kent, granting a peremptory writ of mandamus herein, be and the same is hereby in all things affirmed, and that mandamus issue from said court in accordance therewith. And it is further ordered and adjudged that the relator recover of and from the respondent, his costs, to be taxed, and have execution therefor.

77 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Chase S. Osborn, commissioner of railroads of the State of Michigan, relator, and The Grand Rapids & Indiana Railway Company, respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the

construction of a clause of the Constitution, or of a treaty, or
78 statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said respondent as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of May, in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

To the Supreme Court of the United States:

The execution of the foregoing writ of error appears by the transcript of record hereto attached.

Dated May 31, 1902

CHAS. C. HOPKINS,
Clerk Supreme Court of Michigan.

[Endorsed:] Writ of error 19043 Filed May 5, 1902 Chas. C. Hopkins, clerk.

79 UNITED STATES OF AMERICA, *ss:*

To Chase S. Osborn, commissioner of railroads of the State of Michigan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Michigan wherein The Grand Rapids & Indiana Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said

writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this second day of May, in the year of our Lord one thousand nine hundred and two.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

On this 7th day of May, in the year of our Lord one thousand nine hundred and two, personally appeared Arthur C. Sharpe before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Horace M. Oren attorney general of the State of Michigan and attorney for Chase S. Osborn within named in the suit therein mentioned by leaving the same in the office of the attorney general in the State capitol Lansing Mich. with Roger Q. Wykes assistant to the attorney general.

ARTHUR C. SHARPE.

Sworn to and subscribed the 7th day of May, A. D. 1902.

[Seal of Frank L. Danforth, Notary Public, Kent Co., Mich.]

FRANK L. DANFORTH,
Notary Public, Kent County, Mich.

[Endorsed:] 19043 Filed May 14, 1902 Chas. C. Hopkins, clerk

80 (*Copy of Bond.*)

In the Supreme Court of the State of Michigan.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY (a Corporation), Respondent.

Know all men by these presents, that we, the Grand Rapids & Indiana Railway Company, a corporation organized under the laws of the State of Michigan and Indiana, having its principal offices in the county of Kent in the State of Michigan, as principal, and Thomas J. O'Brien and William R. Shelby, both of the city of Grand Rapids, in said county of Kent, as sureties, are held and firmly bound unto Chase S. Osborn, commissioner of railroads of the State of Michigan, the relator above named, in the sum of one thousand dollars ($1000) to be paid to the said relator, his successors or assigns, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the second day of May, A. D. 1902.

Whereas, the above named respondent has sued out a writ of

error to the Supreme Court of the United States to reverse the judgment of the supreme court of the State of Michigan, dated April 8, 1902, in the above entitled cause that peremptory writ of mandamus issue to compel the respondent to reduce the passenger fares on its railroad to two and one-half cents per mile.

Now therefore, the condition of this obligation is such that if the Grand Rapids & Indiana Railway Company above named shall prosecute said writ to effect and answer all damages and costs, if it shall fail to make good its plea, then the above obligation shall be void, otherwise to remain in full force and virtue.

[SEAL.] THE GRAND RAPIDS & INDIANA RAILWAY COMPANY.

By W. R. SHELBY, *Vice President.* [L. S.]
W. R. SHELBY. [L. S.]
T. J. O'BRIEN. [L. S.]

Attest:

R. R. METHEANY, *Secretary,*
Per W. E. NEAHR.

Approved.
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

81 STATE OF MICHIGAN, } ss:
County of Kent, }

W. R. Shelby being duly sworn deposes and says that he is one of the sureties in the foregoing bond; that he is the owner of real and personal estate situate in the city of Grand Rapids in said county of Kent in his own name unencumbered and not exempt from execution of the value of five thousand — ($5000) and upwards and that he is the owner of property in said county of Kent of the value of five thousand dollars ($5000) over and above all debts, liabilities and exemptions.

W. R. SHELBY.

Subscribed and sworn to before me this 29th day of April, A. D. 1902.

[SEAL.] HENRY F. SCHEIMAN,
Notary Public in and for Kent County, Michigan.

STATE OF MICHIGAN, } ss:
County of Kent, }

Thomas J. O'Brien, being duly sworn deposes and says that he is one of the sureties in the foregoing bond; that he is the owner of real estate situate in the city of Grand Rapids in said county of Kent in his own name unencumbered and not exempt from execution of the value of five thousand dollars ($5000) and upwards and that he is the owner of property in said county of Kent of the value of five

thousand dollars ($5000) over and above all debts, liabilities and exemptions.

T. J. O'BRIEN.

Subscribed and sworn to before me this 29th day of April, A. D. 1902.

[SEAL.] HENRY J. BENNETT,
Notary Public in and for Kent County, Michigan.

(Endorsed:) Filed May 5, 1902. Chas. C. Hopkins, clerk.

82 Supreme Court of the State of Michigan.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY (a Corporation), Respondent.

Assignment of Errors.

Now comes the said respondent and files herewith its petition for a writ of error and says that in the final order and judgment of the supreme court of the State of Michigan and in the records and proceedings in the above-entitled cause, there were errors, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment.

I.

The supreme court of Michigan erred in its final judgment, that the order of the circuit court for the county of Kent, granting a peremptory writ of mandamus herein, be in all things affirmed, and that mandamus issue from said circuit court in accordance therewith to compel the respondent to reduce the passenger fares on its railroad to 2½ cents per mile, the rate fixed by a statute of the State of Michigan, against the objections of respondent in its answer to the petition and order to show cause, that the statute and the enforcement thereof by peremptory mandamus are for reasons therein stated in violation of the provision in the Constitution of the United States, that no State shall deprive any person of property without due process of law.

83 II.

And in over-ruling respondent's objection (in paragraph I in its answer) that the provisions in the constitution of the State of Michigan and in the statute of Michigan as construed by the supreme court, are in violation of the said provision in the Constitution of the United States, for the reasons therein stated. That the State constitution provides that the legislature may establish reasonable maximum rates of passenger fares, and the statute fixes said rates at 2½ cents

per mile, and the supreme court have held that the legislature is the final judge of what are reasonable maximum rates, and that the reasonableness of rates fixed by the legislature is not subject to review or inquiry in the courts.

III.

In over-ruling respondent's objection (in paragraph II in its answer), that the said statute in its terms and as construed, is in violation of the provisions in the Constitution of the United States, that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, for the reasons stated in said paragraph, that it imposes the said rate upon railway companies arbitrarily and finally, without any provision for any inquiry or proceeding to ascertain and determine whether such rate in any case is reasonable or not, and the courts of the State enforce said rate by peremptory writ of mandamus based upon the statute itself.

IV.

In over-ruling the objection of the respondent (in paragraph III in its answer), that the said rate is and would be inadequate, unreasonable and unjust and would not be adequate or reasonable compensation for such transportation upon the railroad of the respondent and that the enforcement of such rate upon the respondent
84 by peremptory mandamus, without any inquiry or determination as to the reasonableness thereof, would be to deprive the respondent of its property without due process of law in violation of said provision in the Constitution of the United States.

V.

In over-ruling the objection of the respondent (in paragraph IV in its answer), that the enforcement of said rate upon it, would be to deprive the respondent of its property, without due process of law, in violation of the Constitution of the United States, predicated of the facts stated in the answer and admitted by the demurrer thereto to be true, that said rate would not be adequate or reasonable compensation for such transportation and that it would reduce materially and not less than $75,000.00 per year (computed on the business of 1900) the gross earnings from the operation of its railroad, which do not now yield a fair income and profit upon the capital invested, over and above expense of operation, economically conducted, and would deprive it to that extent of moneys and income to which it is fairly and reasonably entitled from the use of its property, for such transportation, and would in many instances be less than the actual cost of running the trains to afford such transportation, and of the facts stated in paragraph VII, fully and in detail as to the property and the cost thereof to the respondent, and the interest bearing indebtedness, and as to the total earnings of the railroad and the capital stock, and that the total earnings for 1900 were $2,862,069.36,

and that the surplus thereof over operating expenses, interest on debt and other charges was $83,475.11, and that the reduction of passenger fares to 2½ cents per mile would reduce the earnings $78,489.00 per annum, and that the effect of this on the basis of the business of 1900, in which the earnings were greater than in any former year, would be to very nearly leave no surplus whatever and practically make the stock worthless.

85

VI.

In over-ruling the objection of respondent (in paragraph V in its answer), that the said statute as construed operates as a regulation of commerce among the States, in violation of the provision in the Constitution of the United States, which vests in Congress exclusive power to regulate such commerce, for the reasons stated in said paragraph, that respondent's railroad is an interstate road, that a large part of its said earnings is derived from interstate business, that the statute imposes the 2½ cent rate upon companies, the earnings of whose passenger trains exceed $2,000.00 per mile of road operated, that the supreme court of Michigan has decided that earnings, for the purposes of said statute, must include the so-called Michigan proportion of interstate fares and earnings, and that excluding earnings from interstate business, the earnings of passenger trains on respondent's road would be less than $2,000.00 per mile of road operated.

VII.

In over-ruling and denying the prayer of respondent in its petition for certiorari that the said order of the circuit court for the county of Kent be reversed and declared to be void, for the reasons therein fully stated, that the statute and the order are in violation of the said provisions in the Constitution of the United States.

VIII.

(This statement is introduced to make plain on their face the assignments of error which follow.)

The respondent is a corporation formed by the purchasers of the property at a sale June 10, 1896, under decree on the foreclosure of a mortgage made by another corporation owning the property August 1, 1884, when the rate allowed by the law was 3 cents

86 per mile, under a statute of Michigan then and still in force, which provided that railroad companies should have power to borrow money and to issue their bonds and to mortgage their corporate property and franchises to secure the payment of the same, and that in case of the foreclosure and sale of any railroad under a mortgage, it should be competent and lawful for the purchasers and such others as they might associate with themselves to organize a corporation for the management of the same, by filing a certificate with the secretary of state, and that such corporation when organized, should have the same rights, powers and privileges

as were secured to the original company, whose property was sold under the mortgage (sect. 38 article II and sect. 2 article I, general railroad law of 1873). The right under the Constitution of the United States to a reasonable compensation for its use was attached to the property at the time of the mortgage and inseparable therefrom and the right to object to reduction thereafter by statute, of the fares, to an unreasonable rate, if attempted, was then one of the rights and franchises of the corporation making the mortgage.

In 1889 the amendment to sect. 9 article II, general railroad law, reducing the fare to 2½ cents was passed, without any amendment or modification of the other sections.

June 10, 1896 the railroad property was sold on the mortgage.

July 11, 1896 the purchasers filed the certificate for incorporation under sect. 2 article II.

The purchasers of the property on the sale under the mortgage became vested with all the constitutional rights which the corporation making the mortgage would have.

The respondent corporation, formed by the purchasers at the mortgage sale, became vested (as respondent contends) with all the rights of the company which made the mortgage.

87 That company, if still owning the property, could resist the enforcement of the provision reducing the rate to 2½ cents in the amendment of the statute in 1889 and the answer and objections of the respondent in this case, if the suit were against the old company, would be sustained. (The supreme court of Michigan in its opinion in this case expressly so decided.)

The answer in paragraph VII*a* states fully the facts of the mortgage, the sale, the filing of the certificate by the purchasers, &c.

The relator filed a demurrer to the answer, that the same is not sufficient in law for the reason that upon its incorporation in 1896 under the general railroad law, the respondent entered into and became a party to a contract with the State of Michigan, one of the conditions of which was the agreement on its part to carry all passengers at the rate fixed by section 9 of said general railroad law, under which it is incorporated.

The circuit court sustained the demurrer and ordered that writ of mandamus issue.

The supreme court in its final judgment granted the relator leave to file an amended demurrer in the supreme court, and ordered that the same stand as the demurrer herein, as if originally filed in the circuit court.

The amended demurrer is the same as the demurrer filed in the circuit court, with the addition of the statement "2. That upon its incorporation in 1896, under the general railroad law, the said respondent became subject to that law, and the provision therein requiring it to carry passengers at the rates fixed in section 9 of that law; said provision in regard to rates being one of the conditions of the existence of respondent."

The supreme court having made the order, as stated, as to the

amended demurrer, rendered its judgment in the same order
88 that the order of the circuit court granting a peremptory writ of mandamus herein, be in all things affirmed and that mandamus issue from said court in accordance therewith.

The order of the circuit court was that the respondent by its incorporation, under the general railroad law, entered into a contract with the State to carry passengers at the rate fixed in section 9, and that the demurrer of the relator be sustained, and that a peremptory writ of mandamus issue as prayed.

The right to a fair and reasonable compensation for the use of its property contended for by respondent, is one guaranteed by the Constitution of the United States and respondent's objection to the enforcement upon it of the unreasonable rate of fare which would destroy all profit in the use of its property and deprive it of its property, is based upon the provision in the Constitution of the United States, and upon the claim that the Michigan statute itself and the proposed enforcement under it of the rate, are repugnant to and in violation of that Constitution.

These rights are denied to respondent by the opinion and judgment of the supreme court of Michigan, because of respondent's incorporation, for the reasons stated in the demurrer to respondent's answer, and it has been held by that court that these rights and objections, which it is conceded would otherwise be valid cause against the mandamus, are defeated as to respondent by its incorporation in the manner and according to the facts stated.

IX.

The supreme court of Michigan erred in affirming the order of the circuit court, that the demurrer interposed by the relator to the answer of the respondent, be sustained.

X.

And in affirming the order of the circuit court, that the respondent by its incorporation under the general railroad law
89 of the State of Michigan entered into a contract with the State to carry passengers at the rate fixed in section 9 of said law.

XI.

And in affirming the order of the circuit court, so as to sustain the amended demurrer of the relator as allowed to be filed in the supreme court.

XII.

And in deciding and holding by its order sustaining the demurrer to the answer, that the valid objections of the respondent therein, that the provisions in the constitution and statute of Michigan, as construed by the supreme court of Michigan, were repugnant to the Constitution of the United States, and that the rate of 2½ cents per mile is unreasonable and that the enforcement thereof on the re-

spondent would deprive the respondent of its property without due process of law, in violation of the Constitution of the United States, are nullified as to the respondent, and that the respondent is precluded from the benefit of them by the fact that it became incorporated, in the manner and according to the facts shown by the pleadings.

XIII.

And in the decision expressed in its opinion filed in this suit, that the respondent is not entitled to the rights under the Constitution of the United States, which the company making the mortgage would have, to resist the enforcement upon it of the 2½ cent rate, shown by the answer and admitted by the demurrer to be unreasonable, and so to be deprived of its property without due process of law, in violation of the Constitution of the United States, and that the order of the circuit court should be affirmed.

XIV.

And in sustaining the amended demurrer to respondent's answer and thereby holding and deciding that respondent,
90 by its incorporation in 1896 in the manner and according to the facts which appear in the record, is precluded from insisting upon its right under the Constitution of the United States, to a fair and reasonable compensation for the use of its property and from insisting that the provisions in the constitution and statute of Michigan relating to passenger fares as construed by the supreme court of the State, are invalid because repugnant to the Constitution of the United States, and from objecting to having enforced upon it by peremptory mandamus the statutory rate shown and admitted to be unreasonable, and being thereby deprived of its property, without due process of law, in violation of the Constitution of the United States.

XV.

And in sustaining the demurrer to respondent's answer, and thereby ruling and deciding that the provision in the statute of Michigan relating to the 2½ cent rate, because of respondent's incorporation, controls respondent's rights in its property to the exclusion of its rights therein, guaranteed by the Constitution of the United States.

XVI.

And in holding and deciding by its order sustaining the demurrer, that corporations organized under State laws are bound by provisions in those laws, which are repugnant to the Constitution of the United States and to the enforcement thereunder of rates of compensation for the use of their property which are unreasonable, and the enforcement of which would deprive them of their property, without due process of law, in violation of the Constitution of the United States.

XVII.

And in holding and deciding by its order sustaining the demurrer, that the respondent by its incorporation in 1896 is precluded from the objection that the statute of Michigan, as construed by
91 the supreme court of the State in a decision in 1900, after respondent's incorporation, is in violation of the provision in the Constitution of the United States, which vests in Congress exclusive power to regulate commerce among the States.

XVIII.

It appears that when the respondent was incorporated in 1896, the provision as to the 2½ cent rate was not operative as to its business. The supreme court of Michigan in sustaining the demurrer to respondent's answer, erred in holding and deciding that the respondent is precluded by its incorporation under the general railroad law, from thereafter objecting that the rate is unreasonable, and that its enforcement upon the respondent would be to deprive it of its property without due process of law, in violation of the Constitution of the United States, when it should be attempted to enforce the rate upon the respondent.

XIX.

The supreme court of Michigan erred in deciding and holding that the rights of respondent, to be determined in this proceeding, are governed by that provision in the law, under which it is incorporated, which limits the rates of passenger fares to 2½ cents, and not by the other provision in the same law, that a corporation organized by purchasers of railroad property on sale under mortgage, shall have the same rights, powers and privileges as were or might be secured to the original corporation, whose property was sold under such mortgage, thereby enforcing against the property rights of respondent a statutory provision repugnant to the Constitution of the United States and an unreasonable rate of fare and depriving respondent of its property without due process of law, in violation of the Constitution of the United States.

92 XX.

The supreme court of Michigan erred in its final order, that the relator have leave to file the amended demurrer, introducing the additional ground of demurrer, and that the amended demurrer stand as the demurrer herein, as if originally filed in the circuit court, and that the order of the circuit court sustaining the demurrer be affirmed.

(*a.*) The additional ground of demurrer is erroneous in law as an answer to the respondent's objections against the constitutionality of the Michigan statute and its enforcement.

(*b.*) The supreme court of Michigan had no power on certiorari to allow such amendment against the objections filed by respondent.

(*c.*) The question presented by said demurrer was not in the record when the case was submitted to the supreme court for decision, the amendment was not allowed until the final order of the supreme court was made, and the respondent was thereby denied a hearing upon said question.

93 For which errors, the respondent, The Grand Rapids & Indiana Railway Company, prays that the final order and judgment of the supreme court of the State of Michigan made and entered on the 18th day of April, 1902, dated 8th day of April, 1902, be reversed, and that the petition of the relator be dismissed.

Dated April 21, 1902.

T. J. O'BRIEN,
Attorney for Respondent.

94 [Endorsed:] No. 19043 In the supreme court of Michigan Chase S. Osborn, com'r of railroads, relator *vs.* G. R. & I. R'y Co. respondent Assignments of error and prayer for reversal. Filed May 5, 1902 Chas. C. Hopkins clerk T. J. O'Brien, attorney at law, 903 Mich. Trust Co. bldg., Grand Rapids, Mich. For ——
——.

95 Supreme Court of the State of Michigan.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY, Respondent and Appellant.

STATE OF MICHIGAN, } *ss:*
In the Supreme Court, }

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above entitled cause by said court, including the written decision and reasons therefor, signed by the judges of said court, and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and it is a true transcript therefrom, and of the whole thereof; that attached thereto are the writ of error, with allowance endorsed thereon, citation with proof of service endorsed thereon, a copy of the bond to the adverse party, duly approved, and the assignment of errors and prayer for reversal in the Supreme Court of the United States.

Seal of the Supreme Court of Michigan, Lansing.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this thirty-first day of May in the year of our Lord one thousand nine hundred and two.

CHAS. C. HOPKINS,
Clerk of Supreme Court of the State of Michigan.

Endorsed on cover: File No. 18,572. Michigan supreme court. Term No. 61. The Grand Rapids & Indiana Railway Company, plaintiff in error, *vs.* Chase S. Osborn, commissioner of railroads of the State of Michigan. Filed June 2nd, 1902.

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BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 61.

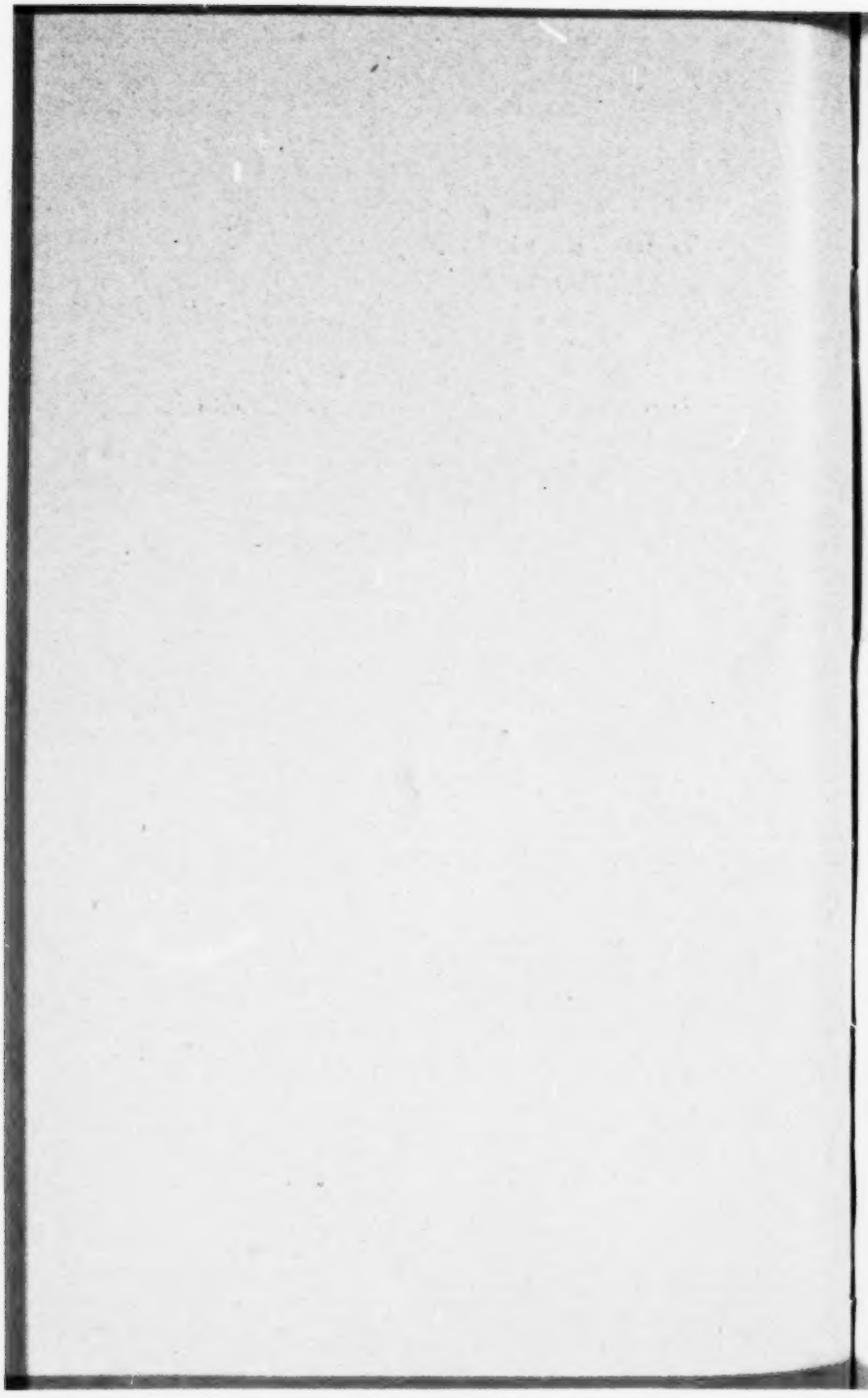
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS OF THE STATE OF MICHIGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

T. J. O'BRIEN,
JAMES H. CAMPBELL,
For Plaintiff in Error.



In the Supreme Court of the United States.

THE GRAND RAPIDS & INDIANA RAILWAY COMPANY,
Plaintiff in Error,
vs.
CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

I. Statement of the Case.

This case comes before the court upon writ of error, to the Supreme Court of the state of Michigan, to review the final judgment of that court, affirming an order of the circuit court for the county of Kent, that a peremptory writ of mandamus issue to compel the railway company, plaintiff in error, to reduce the rates of passenger fares on its railroad to two and a half cents per mile, the rate fixed by a statute of the state.

The provisions in the constitution of Michigan, and the section of the statute under which this proceeding was instituted, appear in full in the printed record, pages 8 and 9.

The Supreme Court of the state, in the case of *Weliman vs. the Chicago & Grand Trunk Railway Company*, 83 *Mich.*, 592, construed these provisions and decided that under the provision in the constitution, the legislature is the exclusive and final judge of what are reasonable maximum rates of charges for the transportation of passengers on all railroads in the state; that the action of the legislature in fixing maximum rates, is final and conclusive upon the companies and the courts, and

that the reasonableness of such rates as fixed by the act of the legislature is not subject to review or inquiry by the courts. This construction was adhered to, and the rate enforced, upon the Wabash Railroad Company by peremptory mandamus in a suit by the commissioner of railroads of the state against that company in April, 1900. 123 Mich., 669, and supplementary opinion, 126 Mich., 113.

In the opinion in the Wabash case, filed April 24, 1900, it was decided that "The gross (annual) earnings of passenger trains," within the meaning of the statute, must include moneys received for carrying the mails and express (123 Mich., 669.), and in the supplementary opinion, filed March 26, 1901, that it is competent for the railroad commissioner, in fixing the rates which the several companies may charge, under the statute, to include in the computation the amount of inter-state fares earned by that portion of the road lying within the state of Michigan. (126 Mich., 113.)

Under another statute of the state, railroad companies are required to make a report, on the first day of April, in each year, to the commissioner of railroads, of their earnings, in detail, for the preceding year ending December 31st, upon blanks prepared and furnished by the commissioner.

The report of the railway company, plaintiff in error, for the year 1900, made according to this form, showed that the earnings of its passenger trains in that year, including the so-called Michigan proportion of earnings from inter-state business, exceeded $2,000 per mile of road.

Proceedings, Pleadings, and Judgment in the State Courts.

On the 13th day of July, 1901, there was filed in the circuit court for the county of Kent, the petition by the commissioner of railroads of the state, which appears in the printed record, pages 3-5.

On filing the petition, the circuit court made an order requiring the company to show cause, on the 26th day of July,

why a peremptory writ of mandamus should not be issued, as prayed in the petition. (R. 6.)

The hearing was adjourned until Aug 9th.

On that day the answer of the respondent was filed. It appears in the record, pages 7-22.

The answer sets forth fully the constitutional and statutory provisions and their construction by the Supreme Court of the state (par. 1, pages 8-11), and alleges that the provisions as so construed are in violation of the constitution of the United States, Sec. 1, Art. XIV, amendments, that the rate sought to be enforced is unreasonable and inadequate, and that its enforement upon the respondent would deprive it of its property, without due process of law, and deny to it the equal protection of the laws, in violation of the XIV amendment (par. III, p. 11-12, par. IV., p. 12-13; par. VI. and VII, p. 13-17), and that the statute as construed is in violation of the Commerce Clause in the National Constitution. (par. V, p. 13.)

The proceedings on the filing of this answer appear in the record, pages 23-26. The attorney general of the state, appearing for the petitioner, asked leave to file a demurrer to the answer, on the ground that the defendant, by its organization in 1896, under the general railroad law, entered into a contract with the state, one of the conditions of which was that it should carry passengers at the rates fixed by the law. Leave to file the demurrer was granted. It was then stipulated that the defendant might amend its answer, setting forth more fully the facts relative to its incorporation, and par. VIIA in the answer (Rec. p. 17-22), was added.

The attorney general, on the 10th day of August, filed the demurrer, which appears in the Record, p. 26-27.

The case was submitted to the court on briefs.

On the 9th day of September the circuit court made the order that the defendant did enter into a contract with the state, and that the writ of mandamus issue as prayed. (Rec. 27.)

The defendant filed in the Supreme Court of the state a petition for writ of certiorari to review that order. (Rec. p. 1-3.)

The writ was allowed, returnable November 14. Return

having been made, the Supreme Court set the case down for hearing on December 10th. On that day it was submitted on printed briefs.

On the 17th day of December the attorney general filed a motion for leave to file an amended demurrer. This motion, with the proposed amendment, appears Record p. 56-57. The amendment consists of the further ground of demurrer, that upon its incorporation in 1896, under the general railroad law, the respondent became subject to that law and the provision therein fixing rates of passenger fares, said provision being one of the conditions of its existence. The defendant filed objections to the amendment. (Rec. p. 58-59.)

No action was taken on the motion to amend, until the decision of the case by the court on the 8th day of April. The respondent was not heard on the question presented by the amendment to the demurrer.

On that day the court filed its opinion (Rec. p. 62-64), and on the same day judgment was entered affirming the order of the circuit court, sustaining the demurrer as amended, and that mandamus issue. (Rec. 64-65.)

Statement of the provisions in the law, and the circumstances under which the respondent became incorporated.

1. The constitution of the state, adopted 1850, provides that "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed."

2. A general law for the incorporation of railroad companies was passed in 1855.

3. The railroad now owned by the respondent, was built in 1870-1874, by a corporation organized under that law. It extends from Ft. Wayne, Indiana, to the straits of Mackinac, in Michigan.

4. In 1873, an act to revise the laws providing for the incorporation of railroad companies was passed. That law,

with amendments of some of its sections, is still in force. It contains more than one hundred sections, divided into five articles. Its provisions relate to many subjects, taxation, police regulations, liability for causing death, etc.

It is found in the compiled laws of Michigan, 1897, Vol. 3, Chapt. 164, pages 1937-2000.

Section 11, Article V, provides that "This act may at any time be altered, amended or repealed, but such alteration, amendment, or repeal, shall not affect the rights of property of companies organized under it."

Section 13, article V, repeals the general law of 1855, and provides that the organization of all corporations under the provisions of said act, "shall be deemed and taken to be organizations under this act."

Section 9, article II, sub-div. 9, provided that the tolls and compensation to be paid for transporting any passenger and his baggage should not exceed three cents per mile.

(Three cents per mile was the rate uniformly charged on the railroads of the state, excepting those in the upper peninsula.)

This provision continued in force until amended in 1889.

Section 38 in article II provides that all companies organized under the act, shall have power from time to time to borrow money, and to issue their bonds or obligations therefor, and to mortgage their corporate property and franchises, and the income thereof, or any part thereof, to secure the payment of the same.

Section 2, article I provides that:

> "In case of the foreclosure and sale of any railroad, or part of any railroad, under any trust deed or mortgage given to secure the payment of bonds sold to aid in its construction and equipment, or for other cause authorized by law, it shall be competent and lawful for the parties who may become the purchasers, and such others as they may associate with themselves, to organize a corporation for the management of the same, and issue stock in the same in shares of $100.00 each to represent the property in said railroad, *and such corporation, when organized, shall have the same rights, powers, and privileges as are*

or may be secured to the original company whose property may have been sold under and by virtue of such mortgage or trust deed. Such organization may be formed by (a certificate containing certain statements, and signed by the purchasers, and filed in the office of the secretary of state) and thereupon the said corporation shall become complete, with all the powers and rights secured to railroad companies under this act, *to all the provisions of which, and amendments thereto, they shall be subject.*

The foregoing provisions still remain in the law, excepting that in section 9 as to rates, which was amended in 1889.

5. The incorporation of the company which built the railroad and then owned it, passed, by operation of the law under the act of 1873. (Sec. 12 and 13, C. L., page 1998.)

6. In 1872 the chapter of the general statutes, entitled, "General provisions relating to Corporations," was amended by adding a new section, 26, as follows: (C. L. 1897, Vol. 3, page 2631, sec. 8552.)

(8552.) Sec. 26. "Whenever any corporation, now existing or hereafter formed, may have conveyed all their corporate property, real and personal, together with their franchises, growing out of or appertaining thereto, or together with all their corporate franchises, by way of mortgage or deed of trust, in case of the sale of the same thereunder, the purchasers at such sale and their associates, shall be entitled to have and exercise all the privileges and franchises held by such corporation, and shall be deemed and taken to be the true owners of its corporate rights, and to be corporators vested with all the rights, powers, and privileges, and benefits conferred by law or the statutes of this state upon such corporations, in the same manner, and to the same extent, as if they were the original incorporators at the formation of such corporation; *and they shall*, within thirty days after such sale shall become absolute, file articles of association, together with a copy of the order confirming the sale, in the office of the secretary of state; and they shall hold title to and enjoy all property acquired by, or donated to, such corporation, which may have been purchased by them at such sale; and such successor corporation may issue, and themselves hold, new stock in said corporation, to such an amount and of such denomination, as was prescribed in the articles of association, or charter of the original corporation. After filing the new articles of association, as required

by this act, the old officers of said corporation shall be superseded, and the old stock in said corporation shall be deemed forfeited and extinguished, and may be canceled on the books of said corporation; and the new stockholders, and the officers by them chosen or elected, shall, in the law, be deemed and taken to be the stockholders and officers of said corporation, and the said corporation shall not be liable for any debts or obligations, except those by it thereafter contracted. But no prior mortgage or lien shall be in any way affected by such proceedings. * * Provided, that in making such sale, the property essential to the exercise of corporate rights, together with the corporate franchises, shall be deemed an entire thing, and shall be sold as such.

7. August 1, 1884, the original company made a mortgage of the property, to secure bonds, amounting to $3,000,000. This was subject to a first mortgage of an earlier date for about $6,000,000, which is still a lien upon the property.

8. In 1889, sub-div. 9 of section 9, article II, relating to rates to be charged for passenger fares, was amended to prescribe the two cent, two and a half, and three cent rates, according to gross earnings of passenger trains. (Rec. 8 and 9.)

9. In 1891 section 9 was amended in other parts, and re-enacted as amended, but no change was made in sub-division 9, relating to rates. The amendment as to rate is sometimes referred to as the law of 1891.

10. Ju[illegible], 1896, the railroad property was sold under decree of the United States circuit court, in foreclosure of the mortgage of August 1, 1884, to John C. Sims (subject to the $6,000,000 first mortgage). The amount of outstanding bonds secured by that mortgage is $5,375,000.

11. July 7, 1896, Sims, the purchaser, and others associated with him, executed the certificate acording to section 2 in article I of the railroad law, and it was filed in the office of the secretary of state on the 11th day of July, 1896. Thereby the respondent corporation was incorporated, and became the owner of the property.

12. April 24, 1900, the Supreme Court of the state decided that the gross earnings of passenger trains, under the statute,

must include receipts for mails and express, and March 26, 1901, that, for the purpose of determining what domestic fare shall be, gross earnings should include the Michigan proportion of earnings from inter-state business, to be added to domestic earnings.

II. Errors Relied On.

The Supreme Court of Michigan, in its final judgment, erred:

1. In ordering that peremptory writ of mandamus issue to compel the plaintiff in error to reduce the rates of passenger fares on its railroad to two and one-half cents per mile, the rate fixed by a statute of Michigan, thereby enforcing upon it a rate alleged and admitted by the pleadings to be unreasonable, and to be inadequate compensation for the transportation and which would deprive it of the right of charging reasonable rates for the use of its property, contrary to the provisions in the XIV amendment to the constitution of the United States, and therby overruling the objections of the plaintiff in error in its answer to the petition that the statute itself, and the enforcement of the rate against the company, are contrary to those provisions.

Assignment of Error I, Rec. 69.

2. In overruling the objection in the answer, paragraph 1, that the provisions in the constitution and statutue of Michigan, relating to rates for passenger fares, as construed by the Supreme Court of the state, are in violation of that provision in the constitution, for the reasons that the state constitution provides that the legislature may establish reasonable rates of fares; the statute fixes the rates, and the Supreme Court of the state has held that the legislature is the final judge of what are reasonable rates, and that the matter is not subject to review or inquiry in the courts.

Assignment of Error II, Rec. 69.

3. In overruling the objection in the answer, paragraph 1, that the statute in its terms, and as construed and enforced, is in violation of said provision in the constitution, for the reasons that it imposes the rates arbitrarily and finally, without any

provision for an inquiry or proceeding to determine whether they are in any case reasonable or not, and the courts of the state enforce the rate by peremptory mandamus, based upon the statute itself.

Assignment of Error III, Rec. 70.

4. In overruling the objections in the answer, paragraphs III, IV, VI, and VII, that the rate would be unreasonable and inadequate compensation for the transportation upon this railroad, and that the enforcement of the rate upon the plaintiff in error would deprive it of its property, and of reasonable compensation for the use thereof, in violation of the provision in the fourteenth amendment to the constitution.

Assignments of Error IV and V, Rec. 70.

5. In overruling the objection in the answer, paragraph V, that the statute, as construed by the Supreme Court of the state, in its decision that part of the inter-state fares must be included in the earnings, operates as an interference with a regulation of commerce among the states, in violation of the provision in the constitution of the United States, which vests in Congress exclusive power to regulate such commerce.

Assignment of Error VI, Rec. 71.

6. In sustaining the demurrer as amended in the Supreme Court, to the respondent's answer.

Assignment of Error XI, Rec. 73.

The Assignments of Error VII, VIII, IX, X, XII, XIII, XIV, XV, XVI, XVII, XVIII, and XIX (Rec. 71-75), relate to this action, and to the points involved in it.

III. Points of Fact and Law.

We submit the case upon the following five propositions. They cover all the errors assigned and relied on:

1. The rate two and one-half cents per mile for passenger fares upon the railroad of the plaintiff in error, which the writ of mandamus would enforce upon it, must upon this hearing be held to be unreasonable and unjust, and inadequate compensation as matter of fact. It is so alleged in the answer, paragraphs III, IV, and VI (Rec. 11-13). These allegations are admitted to be true by the demurrer to the answer.

2. The enforcement of that rate upon the plaintiff in error, by the writ of mandamus which the Supreme Court of Michigan has ordered to be issued, would deprive respondent of its property without due process of law, and deny to it the equal protection of the laws, in violation of the constitution of the United States, amendment XIV, sec. 1.

3. The statute of Michigan prescribing maximum rates of passenger fares, as construed by the Supreme Court of the state, is repugnant to the XIV amendment, sec 1, of the National Constitution.

4. The statute, as construed by the Supreme Court of the state, violates the commerce clause in the National Constitution. The Supreme Court has decided that gross earnings, for the purpose of applying the rates to be charged for domestic fares, must include part of the inter-state earnings from passengers, mails and express.

5. The Supreme Court of Michigan erred in sustaining the demurrer (as amended in that court) to the answer of the defendant.

IV [CITATION OF AUTHORITIES, AND ARGUMENT IN SUPPORT OF THE FIVE PROPOSITIONS ABOVE STATED.]

I.

First point. That the rate in question will, upon this hearing, be held to be unreasonable as matter of fact.

It is admitted by the demurrer to the answer.

164 U. S. 578,592; the Covington & Lexington Turnpike Road Co., vs. Sanford.

This fact is conceded by the Supreme Court of Michigan in its opinion deciding this case. It is said "the answer states that the rate of fare, two and one-half cents per mile, is unreasonable and inadequate, and this statement is admitted by the demurrer to the answer.

II.

Second point. The enforcement of that rate upon the plaintiff in error would deprive it of its property without due process of law, and deny to it the equal protection of the laws, in violation of the XIV amendment, section 1.

134 U. S., 418, Chicago, Milwaukee & St. Paul R. Co. vs. the state of Minnesota.

134 U. S., 467, the Minneapolis Eastern R. Co. vs. the state of Minnesota.

154 U. S., 362, Reagan vs. the Farmers' Loan & Trust Co.

154 U. S., 413-420, three cases following the last cited.

164 U. S., 578, Covington & Lexington Turnpike Road Co. vs. Sandford.

169 U. S., 466, Smyth vs. Ames.

173 U. S., 684, Lake Shore & Mich. Southern R. Co. vs. Smith.

176 U. S., 167, Chicago, Milwaukee & St. Paul R. Co. vs. Tompkins.

143 U. S., 339, Chicago & Grand Trunk R. Co. vs Wellman.

III.

Third point. The statute of Michigan, prescribing maximum rates of passenger fares, as construed by the Supreme Court of the state, is repugnant to the XIV amendment, section 1, of the National Constitution.

The statute declares what the maximum rate shall be. The Supreme Court, in the Wellman case, 83 Mich., 592, and the Wabash case, 123 Mich., 669, and 126 Mich., 113, decided that the legislature is the exclusive and final judge of what are reasonable maximum rates, and that the reasonableness of the rates fixed by the statute, is not subject to review or inquiry in the courts.

The statute so construed violates the XIV amendment. It is the same in this respect as the statute of Minnesota, which was held by this court to be in conflict with that constitutional provision in *134 U. S., 418, Chicago, Milwaukee & St. P. R. Co. vs. the State of Minnesota.* The decision in that case upon this point is in these words:

> "The construction put upon the statutue by the Supreme Court of Minnesota must be accepted by this court for the purposes of the present case as conclusive.
>
> 'That court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made, or inquiry to be had, as to their equality or reasonableness in fact.
>
> 'This being the construction of the statute, we are of opinion, that so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy."

It is settled by the decisions of this court that the question whether rates of fares prescribed by a statute of a state are in any case reasonable or not, is one for judicial inquiry and determination.

134 U. S., 418, 457, C., M. & St. Paul R. Co. vs. Minnesota.

154 U. S., 362, 397 and 399, Reagan vs. the Farmers' L. & T. Co.

156 U. S., 649, 657, St. L. & S. F. R. Co. vs. Gill.

169 U. S., 466, 527, 528, Smyth vs. Ames.

The method of establishing rates, undertaken by the Michigan statute, has all the features of the Minnesota plan, for which the latter was condemned, and to a more objectionable degree. The Michigan statute neither contemplates nor allows any inquiry regarding the reasonableness of the rates. It provides that railroad companies, upon notification from the commissioner of railroads, shall reduce their rates to two and one-half or two cents per mile, as the case may be. The Supreme Court has declared that the legislature is the final judge of what rates are reasonable, and compels companies by mandamus to adopt the rates stated in the notice by the commissioner. That construction was given to the statute in the Wellman case, 83 Mich., 592, in the opinion, pages 620-621, and has never been modified nor withdrawn. It was enforced against the Wabash Company by mandamus.

The court, in making that decision, had before it the decision of this court in the Minnesota case, 134 U. S., 418, and it is discussed in the opinion, 83 Mich., 613-620. The effect of the decision was entirely misapprehended. It is said (page 620) "The decision in the Minnesota case rests not on the right of the legislature to declare what is a reasonable maximum rate, but upon its right to authorize a commission to do so," and "there are many things that a legislature can do that it cannot delegate to any other body, and it would seem, in the opinions of the Supreme Court of the United States, that this is one of them." This view of the decision of this court is erroneous. The principle declared in that case, and upon which it was decided, applies as well to the action of the legislature in fixing the rates as it does to that of a commission appointed by the legislature. The rates enjoined in 164 U. S., 578, were those fixed by the legislature of Kentucky.

IV.

Fourth point. The statute of Michigan, fixing the maximum rates for passenger fares at three, two and one-half, and two cents per mile, according to the gross earnings of passenger trains, as construed by the Supreme Court, violates the provision in the constitution of the United states, article 1, section 8, clause 3, relative to inter-state commerce.

The construction is that in determining what rate for domestic fares shall be charged by any railroad company, it is competent to include in the gross earnings of its passenger trains the amount of inter-state fares earned by that portion of the road lying within the state of Michigan.

> Commissioner of Railroads vs. the Wabash R. Co., 126 Mich., 113.

This point is made in the answer, paragraph V, Rec. 13.

It is there alleged that the respondent is a corporation, organized under the laws of Michigan and Indiana; that it owns and operates a railroad running from Ft. Wayne, Indiana, to the straits of Mackinaw, in the state of Michigan; that it is engaged in inter-state commerce, and subject to the laws of the United States regulating such commerce; that a large part of the earnings of the company is derived from inter-state commerce for the transportation of persons and express matter, and the United States mails, and that excluding from its earnings the so-called Michigan proportion of the earnings of its passenger trains in inter-state business, the earnings of its passenger trains in 1900 (upon which this proceeding is based) would be much less than $2,000 per mile of road.

These allegations are admitted to be true by the demurrer to the answer.

The statutory rates apply to domestic fares only.

But the rate to be charged by any company, of the three rates named in the statute, is determined by the gross earnings of passenger trains, and under the decision, receipts from inter-state business are included in the computation of gross earnings for the purpose of applying the rate for fares within the state. The result of this will interfere with inter-state rates, and may

directly affect them by compelling an increase in them to offset the deficit caused by the reduction of state fares to an unreasonable rate.

The construction of the statute, as stated, violates the commerce clause in the constitution.

169 U. S., 466, Smyth vs. Ames.

> In this case it is said (page 541) that, "the reasonableness or unreasonableness of rates prescribed by the state for the transportation of persons and property wholly within its limits, must be determined without reference to the inter-state business done by the carrier, or to the profits derived from it."

That statement was made in discussing the point made by the appellants (the state board of transportation). The entire paragraph (pages 540-541) is:

> "It is further said in behalf of the appellants, that the reasonableness of the rates established by the Nebraska statue is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the court should take into consideration, among other things, the whole business of the company, that is, all its business, passenger and freight, inter-state and domestic. If it be found, upon investigation, that the profits derived by a railroad company, from its inter-state business alone, are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the legislature prescribe rates for domestic business that would bring no reward, and be less than the services rendered are reasonably worth? Or, must the rates for such transportation as begins and ends in the state be established with reference solely to the amount of business done by the carrier wholly within such state, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its inter-state business, and the value of the property employed in it? If we do not misapprehend counsel, their argument leads to the conclusion that the state of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its inter-state business enough to give it just compensation in respect to its entire line and all its business, inter-state and domestic. We cannot concur in this view. In our judgment, it must be

held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits, must be determined without reference to the inter-state business done by the carrier, or to the profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its inter-state business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its inter-state business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on inter-state business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state, that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for out of, a common fund; and that its capitalization is on its entire line, within and without the state, can have no application where the state is without authority over rates on its entire line, and can only deal with local rates, and make such regulations as are necessary to give just compensation on local business."

If it is not competent, as it was here decided that it is not, to consider inter-state business in determining the reasonableness of statutory rates for local fares, it must be much less competent to actually include inter-state earnings, or any part of them, in the computation which is the basis of the local rate to be charged, as is done in Michigan under the decision of the Supreme Court.

184 U. S., 27, Louisville & Nashville R. Co. vs. Eubank.

This was a suit brought in a state court of Kentucky against the railroad company, a corporation organized under the laws of Kentucky (see 183 U. S., 503) to recover the amount of freight paid for a local shipment in excess of the rate limited

by a provision in the constitution of Kentucky that it should be unlawful for a carrier to charge more for a shorter than a longer haul over the same line in the same direction. The longer haul adopted by the state court in its decision in favor of plaintiff as limiting the charge for the shorter haul within the state, was from a point in the state to a point in another state. This court reversed the judgment, and held that, as construed by the state courts, the provision in the constitution of the state did affect inter-state commerce, although the limitation of the rates to be charged applied only to shipments wholly within the state. In the opinion are the following statements:

> "The effect of the decision by the state court is to hold that the provision of the state constitution is not confined to a case where the long and short hauls are both within the state of Kentucky." (Page 33.) "The foundation upon which the validity of the constitutional provision is based is the theory that it operates solely upon the rate within the state." (Page 34.) "If the state of Kentucky has the right to base its provision for the rate of a short haul within its own borders, by comparison with the rate for a long haul partly within and partly without its own borders, notwithstanding the direct effect of the limitation arrived at by such comparison, may be the regulation, or even the suppression, of the inter-state commerce of the carrier, then this provision is valid; otherwise it would seem to be the reverse." (Page 35.) "The vice of the provision lies in the regulation of the rates between points wholly within the state, by the rates which obtain between points outside of and those which are within the state." (Page 41.) "But the fact which vitiates the provision is that it compels the carrier to regulate, adjust, or fix his inter-state rates with some reference, at least, to his rates within the state, thus enabling the state, by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent, the inter-state commerce of the carrier, which power of regulation the constitution of the United States gives to the Federal Congress."

118 U. S., 557, Wabash, St. Louis & Pacific R. Co. vs. The People of the State of Illinois.

In this case the judgment of the Supreme Court of Illinois, affirming a judgment for the penalty prescribed by a statute of the state against any railroad company which should charge more for the transportation of a passenger or freight for any distance within the state, the same or a greater amount than that charged for a greater distance, was reversed. The suit was based on the fact that the company charged certain shippers more in a contract for the transportation of goods from Gilman, Ill., to New York, than it did other shippers in a contract made the same day for a like shipment from Peoria, Ill., to New York, a greater distance by eighty-six miles.

It is said:

"It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the state. The Supreme Court of Illinois having in this case given an interpretation which makes it apply to what we understand to be commerce among the states, although the contract was made within the state of Illinois, and a part of its performance was within the same state, we are bound, in this court, to accept that construction."

"We think it may safely be said that state legislation, which seeks to impose a direct burden upon inter-state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion occupies that position.

"While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage.

"It is not the railroads themselves that are regulated by this act of the Illinois legislature, so much as the charge for transportation."

In *Hanley vs. the Kansas City Southern Ry. Co.*, decided Jan. 5, 1903, (23 S. C. Rep., page 214.) it was held that the railroad commission of Arkansas cannot, without violating the commerce clause in the Federal Constitution, fix and enforce rates for the continuous transportation of goods between two

points within the state, where a part of the route is outside of the state through the Indian Territory.

Decisions relating to taxation of inter-state business, or of the receipts therefrom, are in point under the following statement in the opinion in the case of *The Wabash, St. Louis & Pacific R. Co. vs. Illinois, 118 U. S., 557.*

> "It is impossible to see any distinction in its effect upon commerce of either class (foreign or inter-state) between a statute which regulates the charges for transportation, and a statute which levies a tax for the benefit of the state upon the same transportation."

The case which is most nearly in point is that of *Fargo, president of the Merchants' Dispatch Transportation Co., vs. Stevens, Auditor General of the State of Michigan, 121 U. S., 230.*

> In that case the judgment of the Supreme Court of Michigan, sustaining the demurrer to the bill filed by Fargo, as president, and dismissing the bill, was reversed. The bill was filed to enjoin the auditor general from collecting taxes assessed on the gross receipts of the transportation company named, which was a joint stock company, organized under the laws of the state of New York. The taxes were assessed under a statute of Michigan, which provided that such companies should make reports to the commissioner of railroads of the state, and that the commissioner should annually file with the auditor general a computation of the amount of tax to be paid by it, under the statute, viz., two and one-half per cent. upon its gross receipts, as computed by the commissioner of railroads. The company named was assessed $722.25 upon its earnings for 1883. Its report showed that the earnings of the company for that year were $124,604.51; that of that sum, $95,714.50 was earned in transportation of freight between points out of the state, and passing through the state in transit, and $28,890.01 in the transportation of freight between points without the state and points within the state. All these sums were so-called "Michigan proportion of earnings," estimated and pro rated according to the mileage of the transportation within the state. The tax was assessed on the sum of $28,890.01, the Michigan proportion of earnings for transpor-

tation which originated or terminated within the state. The complainant in the bill contended that the statute was void as a regulation of commerce among the states. That contention was sustained by this court.

In the opinion is this statement:

"With reference to the utterances of this court, until within a very short time past, as to what constitutes commerce among the several states, and also as to what enactments by the state legislatures are in violation of the constitutional provision on that subject, it may be admitted that the court has not always employed the same language, and that all of the judges of the court who have written opinions for it may not have meant precisely the same thing. Still, we think the more recent opinions of the court have pretty clearly established principles upon that subject which can be readily applied to most cases requiring the construction of the constitutional provision, and that these recent decisions leave no room to doubt that the statute of Michigan, as interpreted by the Supreme Court in the present case, is forbidden as a regulation of commerce among the states, the power to make which is withheld from the state."

135 U. S., 161, Lyng vs. The People of the State of Michigan.

In this case the judgment of the Supreme Court of Michigan, affirming the conviction of Lyng for violation of a state law imposing a tax to be paid by persons engaged in selling liquors, was reversed. Lyng was agent in Michigan of a firm of brewers located in Wisconsin. The firm had a warehouse in Michigan, to which beer was shipped from Wisconsin and stored, and from which it was sold and delivered. This court held that he was merely the representative of the importers, and that he was not subject to the tax. In the opinion is this sentence: "We have repeatedly held that no state has the right to lay a tax on inter-state commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce,

and amounts to a regulation of it, which belongs solely to Congress." This statement is also made in 127 U. S., 640, Leloup vs. The Port of Mobile, and many cases are there cited.

122 U. S., 326, Philadelphia & Southern Mail Steamship Co. vs. Pennsylvania.

In the opinion in this case the question for decision is said to be, "Whether a state can constitutionally impose upon a steamship company, incorporated under its laws, a tax upon the gross receipts of such company derived from the transportation of persons and property by sea between different states and to and from foreign countries." A statute of the state imposed upon such companies a tax of 8-10 of one per centum upon their gross receipts for tolls and transportation, telegraph business and express business. The companies were required to make reports to the auditor general, of their gross receipts. Upon reports of the company, party to the suit, taxes were assessed upon its gross receipts for certain years, all of which were derived from freight and passage money between Philadelphia and Savannah, and in foreign trade from New Orleans. It was held that this transportation was inter-state and foreign commerce; that the state could not constitutionally regulate or interfere with that commerce; that taxing is one of the forms of regulation; that "taxing the transportation, either by its tonnage or distance, or by the number of trips, or in any other way, would certainly be a regulation of commerce, a restriction upon it, a burden upon it, and that clearly this could not be done by the state without interfering with the power of Congress. The question, "If the state cannot tax the transportation, may it nevertheless tax the fares and freights received therefrom?" is answered in the negative. It is further said that, "If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freights receivable for such tranportation must equally belong to that power, and any burdens imposed by the state on such receipts must be in conflict with it. The tax in the present case is laid upon the gross receipts for transportation as such," and, "if such a tax is laid, and the receipts are those derived from transportation of goods and passengers in the way of inter-state or foreign commerce, no matter when the tax is exacted * * * it is an exaction aimed

at the commerce itself, and is a burden upon it, and seriously affects it."

"Referring to the *State tax on railway gross receipts," 15 Wallace (82 U. S.) 284*, it is said, "A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed, is not tenable." "It was held by this court in the case of *Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196*, that inter-state commerce carried on by corporations is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals."

The following sentence is quoted from *8 Wall, 168, Paul vs. Virginia:* "While it is conceded that the property in a state, belonging to a foreign corporation, engaged in foreign or inter-state commerce, may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed upon the property of either corporation, because it is used to carry on that commerce, *or upon the transportation of persons or property*, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and obstruction of, the power of Congress in the regulation of such commerce."

It is further said that the decision in that case, and the reasoning on which it is founded, so far as they relate to the taxation of inter-state commerce carried on by corporations, apply equally to domestic and foreign corporations, and that "their business, as carriers in foreign or inter-state commerce, cannot be taxed by the state, under the plea that they are exercising a franchise."

Further, "The corporate franchises, the property, the business, the income of corporations created by a state, may undoubtedly be taxed by the state; but in imposing such taxes, care should be taken not to interfere with or hamper, directly or by indirection, inter-state or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal Government. This is a principle so often announced by the courts, and especially by this court, that it may be received as an axiom of our constitutional jurisprudence. It is unnecessary, therefore, to review the long list of cases in which the subject is discussed." Many cases are cited in the opinion, following the statement just quoted, and it is said that, "The cases of *Moran vs. New Orleans*, and *Fargo vs. Michigan*, are especially apposite to the case now under consideration."

Other cases are cited "as showing the power of the states over local matters incidentally affecting commerce."

The question for decision, stated at the beginning of the opinion, was answered in the negative. The opinion closes with the sentence, "Our conclusion is that the imposition of the tax in question in this cause was a regulation of inter-state and foreign commerce, in conflict with the exclusive powers of Congress under the constitution," and the judgment of the Supreme Court of Pennsylvania was reversed.

It has also been decided that a state statute, requiring the payment of a license fee for the privilege of doing business in the state by a corporation engaged in inter-state business, and at the same time in local business within the state, is invalid; that the exaction of a license fee is a tax on the occupation, and therefore on the business; that the fact that part of the business is internal to the state does not remove the difficulty, because the tax affects the whole business, inter-state and local, without discrimination.

127 U. S., 640, Leloup vs. Port of Mobile.

Business of the Western Union Telegraph Co. in Alabama.

141 U. S., 47, Crutcher vs. Kentucky.

Business of the United States Express Co. in Kentucky.

Caldwell vs. the State of North Carolina, decided Jan. 12, 1903. (23 S. C. Rep., page 229.)

A license fee, required by the charter of the city of Greensboro, to be paid by the resident agent of a foreign corporation.

"Commerce between the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation."

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 204. Citing 118 U. S., 557.

"If Congress has not made any express regulations with regard to inter-state commerce, its inaction, as we have often held, is equivalent to a declaration that it shall be free in all cases where its power is exclusive."

122 U. S., 326, Philadelphia etc. Co. vs. Pennsylvania.

V.

Fifth point. The Supreme Court of Michigan erred in sustaining the demurrer to the answer.

It was sustained upon ground predicated of the fact that the defendant was incorporated in 1896, after the enactment of the statute fixing the present rates, as an amendment to the general railroad law in 1889. In sustaining the demurrer the court necessarily overruled the objections on constitutional grounds set forth in the answer, (1) that the statute, as construed, violates the XIV amendment; (2) and the provision relating to inter-state commerce, and (3) that the rate is unreasonable, and its enforcement would deprive the respondent of its property, in violation of the XIV amendment.

The first two of these objections were passed over by the court. The third is the only one considered and expressly decided.

The court nevertheless, necessarily overruled all the objections. They are fully set forth in the answer.

It will first be determined whether or not the objections that the statute as construed conflicts with the XIV amendment, and with the commerce clause in the constitution, are well taken.

There can be no question upon this record that the rate is, in fact, unreasonable, and it is well settled by the decisions of this court that the enforcement of an unreasonable rate upon a carrier, deprives it of its property, in violation of the XIV amendment.

The objection under the commerce clause is pertinent. It is averred in the answer, and therefore admitted, that the earnings of the company in 1900, excluding all inter-state fares, did not amount to $2,000 per mile of road. The company would not, by the terms of the statute itself, be subject to the two and a half cent rate if the inter-state fares were omitted.

The decision that inter-state fares must be included in the gross earnings, was rendered in 1901, five years after the

incorporation of the defendant company. That is the construction of the statute which places it in conflict with the commerce clause, as we allege. If the objection on that ground is sustained by this court, it cannot be contended on any possible theory that the defendant is precluded by its incorporation in 1896 from the objection that the construction given to the statute five years later is a violation of the provision in the constitution relating to inter-state commerce.

The Supreme Court of Michigan, notwithstanding these objections, has ordered that mandamus issue to enforce the rate upon the company.

That action, *prima facie* at least, violates the constitutional provisions, and does so conclusively unless the state shall justify it.

The burden is upon the defendant in error in this case to establish a valid reason which will control the constitutional provisions, and make lawful the enforcement of the rate in question, which is on its face a violation of them.

Any reason which could be assigned to support the judgment enforcing the unreasonable rate must rest upon some provision in the National Constitution controlling that in the XIV amendment, or upon some decision of this court giving to that amendment an interpretation which limits its universal application. It could not rest upon state laws, nor upon any construction of those laws by the courts of the states, nor upon any decisions of state courts declaring any rule of general law.

The only reason set up by the representatives of the state to defeat the operation of the constitutional provision in this case is the fact that the defendant became incorporated after the present section, relating to rates, was enacted by amendment of the law.

The reasons stated in the opinion of the Supreme Court for sustaining the demurrer are:

"That the fixing of unreasonable rates is an infringment of the property rights of an existing corporation, within the meaning of the XIV amendment, appears to have been determined by the Federal Supreme Court in," certain cases cited. Among others, the Minnesota case, 134 U. S., 418, and the

Kentucky Turnpike Road case, 164 U. S., 578. "We do not find it necessary to discuss this question (how far and in what respects a law authorizing an incorporation is a contract) at length, for in our view it cannot admit of doubt that corporations formed under an existing law will not be heard to question the rates fixed by the statute."

It is also said that the unreasonable rate could not be enforced upon the original company which was incorporated before the present statute as to rates was enacted in 1889, and that "the case turns upon the question of whether the respondent is (by virtue of the provision in the section under which it is incorporated, that corporations organized by purchasers of railroad property at mortgage sale shall have all the rights of the original company whose property was sold under the mortgage) in position to insist that it occupies precisely the same ground that the former corporation would but for the foreclosure."

That question is not expressly decided. The opinion proceeds (p. 63) to discuss the question whether or not the legislature could, by the amendment of 1889, after the mortgage was made, withdraw from the bondholders the right to reorganize, except on condition of submitting to unreasonable rates, and it is decided that the legislature could, after the mortgage was given, amend the statute and fix rates which would be unreasonable, as a condition of incorporation thereafter, and that such a provision would affect the remedy only, and not the right of property.

The statement in the opinion (p. 63) that, "In our view it cannot admit of doubt that corporations formed under an existing law will not be heard to question the rates fixed by the statute," is asserted upon decisions in which it has been held that "corporations cannot avail themselves of the provisions of the law which give them the right to do business, and disregard those provisions which are onerous." That is true as a general rule, but it does not reach the question in this case, in which the objection to the provision in the statute is that it conflicts with the constitution of the United States. In so far as this statement depends upon the declaration which precedes it,

that this court has decided that the enforcement of unreasonable rates is a violation of the constitution only as to corporation organized before the passage of the statute, it must stand or fall with it.

The decision of the court rests fundamentally upon the statement in the opinion that this court "appears" (in the cases referred to) to have decided that the enforcement of unreasonable rates is unconstitutional only as to corporations organized before the passage of the statute fixing such rates

That statement is erroneous.

This court has never so decided in any case.

There is nothing in any of the cases decided by this court which supports the interpretation given to those decisions by the Supreme Court of Michigan in the statement just referred to.

This court has decided that the enforcement of unreasonable rates upon a corporation owning railroad property would deprive it of its property in violation of the constitution. The decisions are not placed on the ground that the corporations were organized before the enactment of the unreasonable rates. They have no reference to that point at all. The ground of the decisions is that the owner of property employed in the service of the public is entitled to a just and reasonable compensation for its use, and that a state statute which deprives the owner of that compensation, and imposes unreasonable rates, violates the provision in the XIV amendment. No distinction between corporations, depending upon the time of their incorporation under general laws, has ever been expressly declared or recognized by this court in any decision relating to the enforcement of unreasonable rates.

The Supreme Court of Michigan being in error in the statement which is the basis of its decision, and upon which its judgment must rest, it occurs to us that this brief might properly end at this point. Any further discussion would be in anticipation of what may be said in behalf of the defendant in error on this hearing.

It certainly cannot be claimed that this court has decided that the imposition of unreasonable rates is unconstitutional

only as to corporations organized before the passage of the statute fixing such rates.

The only thing that counsel for the defendant in error can do is to contend that this court should now decide, as an original proposition, that corporations organized under general laws of a state which may be altered, amended or repealed under power reserved, are subject to provisions in those laws which are in conflict with the Federal Constitution, if organized after the enactment of such provisions, even if they should be thereby deprived of their property rights under that constitution. It seems that the contention of the state cannot rest upon any narrower ground than this.

No decision of this court can be cited in support of that contention.

No reason appears why any distinction should be made respecting the enforcement of unconstitutional provisions between corporations organized under laws which are subject to alteration, amendment and repeal, because of the time of their incorporation as before or after the enactment of those provisions. When power to amend or alter the incorporation law is reserved, a provision enacted after the organization of any corporation is as binding upon that corporation as one enacted before. The fact that corporations have been organized under the law does not operate as a restraint upon the power of the legislature to amend and alter the law. But the legislative action is in all cases subject to the constitutional limitations.

If the contention suggested shall be presented by counsel for defendant in error we shall submit in opposition thereto,

1. The supreme authority of the National Constitution prevails at all times and places. That constitution must be read, together with every law of a state, to determine the rights of persons and property under such law. Rights which are within its protection cannot be taken away or impaired by the state under any circumstances. A corporation cannot be said to surrender its property rights under the constitution by becoming incorporated under a state law, any more than an individual surrenders his personal rights under the constitution

by becoming a citizen of the state and subjecting himself to its laws. The constitutional provisions are paramount always, and state ordinances and enactments must yield to them.

2. That it is not competent for the legislature of a state, in passing laws authorizing corporations to be organized, or foreign corporations to do business within the state, to impose conditions upon either which are repugnant to the constitution of the United States, or which would deprive them of any right under that constitution, and that corporations do not become subject to the enforcement of such conditions by organizing or engaging in business under the laws of which such conditions form a part.

This court has decided that provisions in a state law, which impose upon foreign corporations conditions which are in conflict with the constitution, cannot be enforced against a corporation which avails itself of the law, even after the enactment of such a provision.

It has been so held respecting conditions against the removal of suits to the Federal courts.

126 U. S., 186. Barrow vs. Burnside.

146 U. S., The Southern Pacific Co. vs. Denton.

Also as to conditions attached to the right to carry on inter-state commerce.

141 U. S., 47. Crutcher vs. Kentucky.

The last sentence in Barron vs. Burnside is,

"In all the cases in which this court has considered the subjct of the granting by the state to a foreign corporation of its consent to the transaction of business in the state, it is uniformly asserted that no conditions can be imposed by the state which are repugnant to the constitution and laws of the United States."

In Crutcher vs. Kentucky, it was said:

"If a partnership firm of individuals should undertake to carry on the business of inter-state commerce between Kentucky and other states, it would not be within the province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on inter-

> state commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; *and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right*, unless Congress should see fit to interpose some contrary regulation on the subject."

The right to a just compensation for the use of property is one as sacred under the National Constitution, and as fully within its protection, as the right to carry on inter-state commerce, or to remove a suit to the Federal Courts. Congress itself has no control over it. It must necessarily follow that a condition imposing unreasonable rates, in whatever form it may appear, is void equally as conditions affecting the other rights under the constitution. The same principle applies to all rights under the constitution.

It is not any more competent for a state legislature to impose unconstitutional conditions upon a domestic corporation, than to impose such conditions upon foreign corporations allowed to do business within the state.

If provisions in the laws of a state, which are in conflict with the constitution, can be enforced upon corporations organized after their enactment, the rule would apply against all provisions in the constitution. A statute actually fixing rates for inter-state fares could be enforced as well as one imposing unreasonable rates.

3. It is true, as a general rule, that corporations organized under the laws of a state are not subject to provisions in those laws which conflict with the constitution of the United States. There have been many cases in this court in which corporations have been protected against the enforcement of such provisions. In none of these has the decision been placed on the ground that the statute was passed after the organization of the corporation. There is no intimation in any case that a different rule would apply if the organization had taken place after the enactment of the law.

Instances of such cases appear in the citations under the

preceding second paragraph in this argument, relating to the enforcement of unreasonable rates.

The right to enforce the rate was not in any of these cases denied on the ground that the company was incorporated before the law by or under which the rate was fixed was passed. It was denied in every case, on the ground that the enforcement of an unreasonable rate would be a violation of the fourteenth amendment.

There could be no distinction regarding the authority of statutory provisions relating to corporations depending upon the time of their enactment, as before or after incorporation of any company, excepting in cases in which the right to amend or repeal the incorporation law was not reserved, and that distinction would rest upon the constitutional prohibition of laws impairing the obligation of contracts, and not upon the fourteenth amendment.

4. The power of the legislatures of the states to establish rates of fare is not absolute nor arbitrary. It exists, and can be exercised only within well defined limitations. A carrier has the right to fix its rates for passengers and freight, subject to the common law rule, that they must be reasonable. The power of the legislature is to protect the public against unreasonable rates, and in the exercise of that power the legislature cannot impose upon the carrier unreasonable rates.

173 U. S., 684, 698, Lake Shore & M. S. R. Co. vs. Smith.

169 U. S., 466, 527, Smyth vs. Ames.

In the last case, it is said, page 527, that "it cannot be admitted that the power granted (to establish maximum rates) may be exercised in derogation of the rights secured by the constitution of the United States," and on pages 527-528, that

"The duty rests upon courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation."

In 134 U. S., on page 455, there is quoted from the decision

in Stone vs. The Farmers' L. & T. Co., 116 U. S., 307, 325, the sentence, "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit," etc.

The power of the legislature under the Michigan constitution is to prescribe *reasonable* maximum rates.

5. The provision in the section of the statute under which the respondent company is incorporated (section 2 in article I.) that corporations organized by purchasers of railroad property at sales under mortgage shall be "subject" to all the provisions of the law and amendments thereto, does not add anything to the force or authority of the law. It is a declaration of the general rule of law that corporations are subject to the provisions of the acts under which they are incorporated. The defendant in this case, organized under that section, is subject to the provisions in the general railway law, of which that section is part, in the same manner and to the same extent, no more and no less, that it would be if the section did not contain that provision. It amounts to nothing more than a legislative declaration of the principle of the common law that corporations are subject to the laws under which they are incorporated. Such a declaration adds nothing to the force of the law.

108 U. S., 536, Ruggles vs. Illinois.

The defendant is not, by virtue of that provision, any more subject to a condition in the law which conflicts with the constitution of the United States, than it would be without it!

The provision is that such corporations shall be subject to all the provisions of the act, *and amendments thereto.* The claim that the provision binds a corporation to the rates prescribed by the statute, whether reasonable or not, would apply to every amendment of the rates passed after incorporation under the law, as well as those enacted before.

If it shall be decided that, as a general rule, corporations are subject to provisions in the state laws in conflict with the constitution, which are enacted before their incorporation, we shall contend that the defendant company in this case is not to be treated the same as a new corporation organized and building a railroad property after the amendment of the section as to rates, in 1889, and that the rate should not be enforced upon it because of the particular circumstances and the provisions in the laws under which the company became incorporated.

These have been fully stated in this brief, pages 4-7.

Attention is called to the following:

The sections in the laws of 1873 still in force, (1) giving companies power to mortgage their property, (2) authorizing purchasers of the property on mortgage sale to organize a corporation.

The construction of the railroad in the years 1870-1874.

The mortgage made by the company then owning the property on the 1st day of August, 1884.

The amendment, in 1889, of the section limiting rates of fares.

Sale of property on the mortgage, June 10, 1896.

Certificate of incorporation by the purchasers, July, 1896.

March, 1901, construction of the rate section by the Supreme Court. Inter-state fares must be included in gross earnings.

April, 1901, computation by the commissioner of railroads, of the gross earnings of the company in 1900, including part of inter-state earnings, makes them more than $2,000 per mile.

July, 1901, present proceeding for mandamus instituted to compel the company to reduce its fares.

The grounds upon which we shall claim that the rate cannot be enforced upon this company are,

1. The right to a reasonable compensation for the use of property employed in the service of the public is an attribute of the property itself, under the XIV amendment, and inseparable from it. It inures for the benefit of every owner of the property by whom it may be lawfully acquired and held. The company in this case has, under the laws of Michigan and

Indiana, become the owner of the property, with all the rights pertaining to it. The right to just compensation attached to this property as soon as it was brought into existence, and has adhered to it through all changes in ownership. It could not be taken away or impaired by the state under any circumstances. The company, as owner of the property, has the right of objection to the unreasonable rate, independent of any pre-existing right in the original company.

2. The provision in the statute now sought to be enforced, although enacted before the incorporation of the company in 1896, was not operative as to the property at the time of such incorporation, and was not claimed to have become operative until six years thereafter, in 1902. It then became operative only by reason of the decision of the Supreme Court in 1901, that part of the inter-state earnings must be included in the gross earnings for the purpose of determining the rates to be charged under the statute.

In *171 U. S., 361, Smyth vs. Ames*, it was said that "The reasonableness of a schedule of rates must be determined by the facts as they exist when it is sought to put the rates into operation."

This case clearly comes within that rule.

The time when a provision in a statute becomes operative is the time when the right of objection is to be determined in cases in which the objection rests upon matters of fact.

The question whether a rate is reasonable or not is one of fact.

And is to be determined by the circumstances and conditions as they exist at the time when the statute, by its terms, becomes operative, and its enforcement is attempted.

If the owner of the property can then show that the rate would be unreasonable, it will not be held to be precluded from that ground of objection because the statute was enacted before its incorporation.

The statute does not fix a single uniform rate, but a schedule of rates, three cents, two and a half cents, and two cents, according to earnings.

Three cents was, when the company was incorporated, and

is now, a reasonable rate for fares upon its railroad, and is the rate which has always been charged. When the company was incorporated, and for six years thereafter, it was, by the terms of the law, allowed to charge the three cent rate.

The rates are fixed by the statute, according to gross earnings, without reference to any other fact, and are arbitrary. This method of fixing rates is not one calculated to secure rates which are reasonable. Other things, such as the cost of construction and of maintenance and of operation, are material elements. Those of each property will vary from others. The rates prescribed may be reasonable for one railroad, and not reasonable for another. Each case will present its own facts.

It could not be said, when the company was incorporated, whether the two and a half cent rate would, when it should become operative, if ever, by the terms of the statute, be reasonable or not. It might be and it might not, under facts and conditions then existing. The company is not, under the circumstances, precluded by the fact of its incorporation from now showing, when it is claimed that the provision has become operative and it is attempted to enforce it, that the rate under existing conditions would be unreasonable, and from insisting upon the constitutional objection on that ground.

3. The provision in the section of the law under which the company became incorporated, that "such corporations, when organized, shall have the same rights, powers and privileges as are or may be secured to the original company whose property may have been sold under and by virtue of such mortgage." The entire section appears in this brief, pages 5 and 6.

The right in question is the right to just compensation for the use of the property, and to resist the imposition of an unreasonable rate. That right is one possessed by the original company. It is not a right or privilege derived from the state, but is one under the National Constitution.

This provision in the law is material only as an answer to the claim by the relator that the company, by its incorporation, became subject to the law so as to be precluded from the objection that the rate is unreasonable.

It is referred to in the opinion, but there is no express decision by the court as to its effect. After reciting the section and stating the defendant's claim under it, the opinion turns to the question of the power of the legislature to reduce fares after the making of the mortgage.. That question is decided in favor of the power to reduce fares to an unreasonable extent, and it is the only point that is expressly decided in the opinion. Other rules as stated are assumed to be the law.

4. Section 8552, Compiled Laws (sec. 26, in the chapter "General Provisions Relating to Corporations"). This section is given in full in this brief on pages 6 and 7. It applies to all corporations. It provides that purchasers of corporate property on mortgage sale

> "Shall be entitled to have and exercise all the privileges and franchises held by such corporation, and shall be deemed and taken to be the true owners of its corporate rights, and to be corporators *vested with all the rights, powers, privileges, and benefits conferred by law or the statutes of this state upon such corporations in the same manner and to the same extent as if they were the original incorporators.*"

It requires that they shall form a new corporation in the manner prescribed by the section. That method is to be followed in all cases, excepting those in which the act relating to particular corporations prescribes some other method of forming the new corporation by the purchasers. The railroad law does contain such a provision, and it was followed in this case.

5. *Rights of the original company, and of the bondholders and purchasers.*

The bonds were issued and the mortgage made in 1884, before the section relative to rates was amended in 1889.

It is conceded that the rate in question could not be enforced against the company which made the mortgage, if it still owned the property, and that it could successfully defend the present attempt to enforce the rate, on the ground that it is unreasonable.

The holders of the bonds, or the trustees in the mortgage, would have the same rights.

The case of *Reagan vs. the Farmers' Loan & Trust Co., 154 U. S., 362*, was upon bill by the trustees in a trust deed securing the bonds of a railroad company, to enjoin the railroad commission of the state of Texas from enforcing rates of freight fixed by the commission under a statute of the state, on the ground that they were unreasonable. The decree perpetually enjoining the comimssion, as prayed, was affirmed by this court.

The bondholders secured by the mortgage of 1884 on the property in the present case, or the trustees in the mortgage, could, if the bonds were still outstanding and the mortgage not foreclosed, maintain a like suit to enjoin the enforcement of the rate in question, on the ground that it is unreasonable.

It is also true, and is conceded, that the purchasers at the sale under the mortgages would have the same right that the corporation which made the mortgage would have, to resist the enforcement of this rate.

We have in the case these facts:

The existence of the railroad property since about 1872.

The sections in the railroad law of 1873, giving railroad companies power to mortgage their property, and the purchasers on mortgage sale power to organize a corporation for the ownership and management of the property.

Section 9, in the law of 1873, limiting fares to three cents per mile.

The mortgage, August 1, 1884.

The amendment of section 9, as to rates, in 1889.

The point expressly decided by the Supreme Court in its opinion, is that the legislature could, after the mortgage was made, withdraw from the bondholders the right to re-organize except on the condition of submitting to the rates fixed by the statute, even if unreasonable.

The court puts the contention of the defendant in the form which appears in the statement in the last paragraph on page 63, "It is contended that the legislature could not, by the amendment of 1889, withdraw from the bondholders the right to reorganize, except on condition," etc.

The question, as we understand it, is whether or not the

defendant is, by its incorporation, precluded from the objection that the rate is unreasonable, and is much broader than the contention as stated in the opinion.

We do not claim that the present company has the right to charge three cents per mile because the original company charged it. The objection to the two and a half cent rate is that it is unreasonable.

We do not question the power of the legislature to reduce fares after the making of the mortgage, the general law being subject to amendment or repeal. Our contention is that it could not reduce them so that they would not afford a reasonable compensation for the use of the property, and that it would be competent for any party owning or having a substantial pecuniary interest in the property, to resist the enforcement of the rates fixed by the amendment, if unreasonable. The original company, the trustees in the mortgage, the bondholders secured by the mortgage, and the purchasers at the mortgage sale could do it, and the corporation organized by the purchasers would have the same right.

The Supreme Court decided that the legislature could, after the mortgage was made, withdraw from the bondholders the right to reorganize, except on condition of submitting to unreasonable rates, that such legislation would affect the bondholders' remedy only, and not any right of property, for the reasons: (a) That the purchasers, upon the foreclosure sale, independent of any express statutory authority, were authorized to maintain their property rights and operate the railroad in accordance with the franchise of the original company, and under the same conditions, and the authority to incorporate was not essentially a part of the property right, but was a privilege granted by the state, which might be withdrawn. (b) That the legislature possessed the power to repeal the statute, and could do that, either before or after the reorganization, and thereby deprive the purchasers of the power of reorganization. (Page 64.)

The statement that the purchasers had the right to operate the railroad as a corporation under the franchise of the old company, without reorganization, is erroneous. Section 26

in the chapter "General Provisions Relating to Corporations" prohibits that. The section is printed in this brief on pages 6 and 7.

The statement that the legislature had power to repeal the law is immaterial. The law has not been repealed. It remains in force. The defendant is incorporated under it, and the question is its right, in view of that incorporation, to object to the rate as unreasonable.

The decision that the legislature could deprive the purchasers of the right to reorganize, except on condition of submitting to the rates fixed by the statute, even if unreasonable, is wrong in principle. The right of the purchasers to incorporate is retained in the statute. The legislature could not attach to it any condition requiring the corporation to carry at unreasonable rates, nor any other condition in conflict with the National Constitution.

6. This company is not claiming any mere exemption or immunity which was possessed by the former company. It is insisting upon a right under the constitution. Cases in which it has been held that exemption from taxation and like privileges do not pass to purchasers at sales under mortgages, have no application in this case.

We respectfully submit that the judgment of the Supreme Court of the state of Michigan, ordering that mandamus issue to compel the plaintiff in error to reduce its rates of passenger fares to two and a half cents per mile should be reversed, and such further order made as may seem proper to this court.

T. J. O'BRIEN,

JAMES H. CAMPBELL,

For Plaintiff in Error.

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Clerk

BRIEF FOR PLAINTIFF IN ERROR IN REPLY

TO THE POINT THAT THE JUDGMENT OF THE STATE COURT WAS NOT BASED UPON ANY FEDERAL QUESTION, AND THAT THIS COURT IS WITHOUT JURISDICTION TO REVIEW IT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 61.

THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS OF THE STATE OF MICHIGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

T. J. O'BRIEN,
JAMES H. CAMPBELL,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

October Term, 1903. No. 61.

THE GRAND RAPIDS & INDIANA RAILWAY COMPANY,
Plaintiff in Error,
vs.
CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan.

Reply by Plaintiff in Error to point in brief for Defendant in Error that the judgment of the Supreme Court of Michigan was not based upon any Federal question, and this Court is without jurisdiction to review it.

The point stated above appears in the brief, p. 39-40.

We contend that the judgment of the Supreme Court of Michigan is reviewable by this Court.

1. Section 709, Rev. Stat., provides that a final judgment or decree in any suit in the highest Court of a state in which a decision in the suit could be had where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution of the United States, and the decision is in favor of their validity, or where any right is claimed under the Constitution of the United States, and the decision is against the right specially set up or claimed by either party under such Constitu-

tion, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.

2. All the things necessary to give this Court jurisdiction to review the judgment of the Supreme Court of Michigan, appear in this case.

3. The proceeding was instituted to compel the Railroad Company to reduce the rates of passenger fares on its railroad to two and a half cents per mile, the rate fixed by a statute of the state for railroads, the gross earnings of whose passenger trains are more than $2,000, and less than $3,000 per mile. The petition averred, the statute, the incorporation of the company, that the report of the company showed that the gross earnings for the year 1900 of its passenger trains were more than $2,000 and less than $3,000 per mile; that notice had been given to the company to reduce its rates, and that it had refused, and prayed that the writ of mandamus be granted to compel the defendant to reduce the fares to two and a half cents.

4. The defendant in its answer to the petition, rested its defense upon three grounds,

> first, that the Statute of Michigan, as construed by the Supreme Court of the state, is repugnant to the Constitution of the United States. Fourteenth Amendment. Ans., par. I and II.
>
> second, and to the provision of the Constitution, Art. I, Sec. 8, clause 3, which vests in Congress exclusive power to regulate commerce between the states. Par. V.
>
> third, that the rate sought to be enforced would be unreasonable and not just or adequate compensation for the transportation to which it relates, and that the enforcement of such rate would deprive the defendant of its property without due process of law, and deny to it the equal protection of the laws in violation of the Fourteenth Amendment. Par. III, IV, VI, and VII.

It is also averred that if earnings from interstate business were excluded in computing gross earnings for the purposes of the statute, they would be less than $2,000 per mile, and the company would not be subject to the proposed rate, even under the terms of the statute. Par. V.

5. The relator filed a demurrer to the answer. The

demurrer admits the truth of the allegations of fact in the answer, that the rate would be unjust and unreasonable, and that the gross earnings would be less than $2,000 per mile if the earnings from interstate business were not included.

6. The record in this case not only presents Federal questions, but it presents no question which is not Federal.

7. By the answer of the defendant filed in the Court below, there were drawn in question the validity of the statute fixing rates upon which the proceeding was founded, and of the authority sought to be exercised thereunder to compel the defendant to reduce its fares on the ground that they were repugnant to the Constitution, and the decision of the State Court was in favor of their validity. The defendant also by its answer specifically set up and claimed the right under the Constitution to maintain a rate of charges for passenger fares which would be reasonable and afford just compensation for the use of its property, and the right to object to the enforcement of a rate admitted to be unreasonable in fact, and the right to have the reasonableness of the rates of fares for travel on its railroad within the state determined without referring to or including its earnings in interstate business, and the decision of the State Court was against these rights.

8. The proceeding is such as to involve the objections on constitutional grounds to the validity of the statute, and to the enforcement of the unreasonable rate, and to including interstate earnings in computing earnings for the purpose of fixing domestic fares. It was competent for the defendant to make these objections, and to draw in question the validity of the statute, on the ground that it was repugnant to the Constitution, and to claim the right to charge reasonable rates of fares, and to resist the enforcement of an unreasonable rate, and to have its interstate earnings excluded in fixing its domestic fares. All these the defendant did distinctly and specifically aver, set up and claim in its plea in answer to the petition, in proper form and at the proper time.

9. The issue in the case was such, and the objections to the validity of the statute and the claim by the defendant of the

rights stated above, were so placed that the Supreme Court of Michigan, in rendering its judgment that mandamus issue to compel the defendant to reduce its rates to two and a half cents, necessarily overruled and denied those objections and claim of rights by the defendant under the Constitution.

The decision is of necessity in favor of the validity of the statute, and of the authority exercised under it against the objections of the defendant set forth in its answer, and is of necessity against the rights of the defendant under the Constitution set up and claimed in the answer.

10. The necessary effect of a judgment and decision of a State Court upon the issues and questions in the case, rather than the grounds of the decision or the reasons or argument in support of it, as stated in the opinion, must determine whether the case is one for review by this Court or not.

11. It is for this Court in this case ultimately to decide whether or not the Statute of Michigan, fixing rates of fares, as construed by the Supreme Court of the state, is repugnant to the Fourteenth Amendment and to the Commerce clause, and whether or not the enforcement of the rate admitted to be unreasonable, would deprive the company of its property in violation of the Constitution.

12. It is also for this Court in this case to ultimately decide whether or not the defendant has, by its incorporation, waived or estopped itself from insisting upon the rights under the Constitution, which it otherwise would have, to receive reasonable rates of fares, and to resist the enforcement of unreasonable rates, and to object to interstate earnings being taken into account in fixing domestic fares, and from the right which it would otherwise have to object to the invalidity of the statute, on the ground that it is repugnant to the provisions in the Constitution.

13. These questions being in the case, and a decision of them necessary to any judgment in the State Court, the jurisdiction of this Court could not be barred by any form which the State Court could give to its opinion, or by any statement therein of the grounds and reasons for its decision.

14. The record in this case is such in the issues formed and the questions raised as to make proper a review of the judgment by this Court.

The opinion filed in the State Court does not place the decision of that Court upon grounds which bar the jurisdiction of this Court. On the contrary, the grounds of the decision as therein stated are such as to call for a review by this Court.

First, an interpretation is given to the decisions of this Court, in which it has applied the provisions in the Fourteenth Amendment, against the right of a state to enforce upon railroad corporations unreasonable rates of fares, which those decisions do not justify, and which limits their application to corporations only which are organized before the enactment of the laws, a distinction never expressed by this Court. That interpretation is the foundation upon which the judgment of the State Court rests. The very clear decisions of this Court upon the subject of the enforcement of unreasonable rates are recognized only to the extent that it is said that it "appears" to have been decided by the Supreme Court of the United States that the fixing of unreasonable rates is an infringement of the property rights of an existing corporation within the meaning of the Fourteenth Amendment.

Second. It holds that a state, in enacting laws authorizing incorporations for the purpose of owning, using and operating property, can annex to them conditions which are repugnant to the Constitution of the United States, and enforce them upon corporations organized under the laws, and thereby deprive them of their property rights under the Constitution.

Third. It expressly holds that the Legislature of Michigan could impose the acceptance of unreasonable rates (in violation of the Fourteenth Amendment) as a condition of the reorganization and incorporation by purchasers of railroad property on mortgage sale.

Fourth. The right of the State to repeal the statute authorizing such incorporation, although referred to in the opinion, is not involved. The law has not been repealed, but remains in force, and the question is of the right of the state to attach

to it conditions which are in violation of the United States Constitution, and of property rights thereunder.

Rights under the Constitution of the United States, and objections to the constitutionality of the statute, having been expressly and in due time asserted, and the effect of the judgment being to deny those rights and overrule the objections, this Court has jurisdiction to review the judgment, although the State Court did not, in express terms, pass upon the Federal constitutionality of the law.

23 Supreme Court Rep., 237, 239, Andrews vs. Andrews.

23 Supreme Court Rep., 540, 541, Detroit, Ft. Wayne, etc., R. Co. vs. Osborn.

113 U. S., 574, Chicago Life Ins. Co. vs. Needles.

185 U. S., 203, Consolidated Coal Co. vs. Illinois.

15. Counsel for defendant in error do not correctly state the decision of the Supreme Court of Michigan in this case. In the brief, on page 40, it is said that, "The demurrer of appellee raised the question of whether, by its acceptance of the powers and rights conferred by the law through incorporation thereunder, it (the appellant) must not be held to have agreed that its passenger charges should be according to the provisions of that Act. The Michigan Supreme Court so decided. The view taken by the latter Court did not involve a Federal question. It is broad enough in itself to support the final judgment without reference to the Federal question sought to be raised by appellant."

This statement shifts the contention of the state back to the ground first stated in the demurrer filed in the Circuit Court, that the Railroad Company, by its incorporation in 1896, entered into a contract with the state to carry at the rates named in the law. The Circuit Court decided that it did. That ground was abandoned in the Supreme Court, and was not decided by that Court. The demurrer was amended in the Supreme Court so as to change the claim of the state from that of a contract to that stated in the amended demurrer, viz.,

that upon its incorporation in 1896, under the General Railroad Law, respondent became subject to that law and the provision therein, fixing rates of passenger fares, said provision being one of the conditions of its existence.

16. The position taken by counsel in the statement in the brief, on page 40 (part of the statement just quoted), that "The view taken by the latter Court (the Supreme Court of Michigan) did not involve a Federal question. It is broad enough in itself to support the final judgment without reference to the Federal question sought to be raised by appellant," cannot be sustained.

In the first place, the decision of the Michigan Supreme Court is not correctly stated. That Court did not decide that the Railroad Company, by its acceptance of the powers and rights conferred by the law through incorporation thereunder, must be held to have agreed that its passenger charges should be according to the provisions of that Act.

The Supreme Court of Michigan did not place its decision upon any ground independent of, and which did not involve, the Federal questions raised in the case.

The express decision of the Court is that a provision in a state law, imposing unreasonable rates as a condition of incorporation under the law, is not repugnant to the Constitution. The last sentence in the opinion is, "We think the legislation was not unconstitutional." (Pr. Rec., 64.) That is, that the amendment of the statute reducing rates of fares to an unreasonable extent, is not a violation of the Constitution.

The opinion ending with the sentence just quoted begins with the statement that the decisions of this Court apear to be that a statute fixing unreasonable rates violates the Fourteenth Amendment only as to corporations existing before the enactment of the statute.

The questions so decided are essentially Federal. The entire decision and the judgment is based upon them.

This Court has decided that the enforcement upon a railway corporation of a rate which is unreasonable, deprives it of its property without due procees of law, in violation of the Four-

teenth Amendment. The question whether or not a corporation is subject to such enforcement because of the fact that it was organized after the enactment of the statute prescribing the unreasonable rate, notwithstanding the provisions of the Fourteenth Amendment, as construed and applied by this Court, is a Federal question.

The question whether a corporation, organized under a state law, is subject to provisions in that law enacted before its organization which are repugnant to the Constitution of the United States, and is precluded, by the fact of such incorporation, from objecting to their invalidity, when it is sought to enforce them upon it, is a Federal question.

17. The case cited by counsel for defendant in error in support of their fourth point (Brief, on page 39), 166 U. S., 489, The Electric Co. vs. Dow, does not support their contention. No right of the Electric Co. under the Constitution of the United States was infringed, and the facts of the case presented no Federal question. The suit was instituted by petition by Dow for the assessment of damages for injury to his land, by an overflow caused by a dam erected by the defendant. The company filed a cross petition praying for an inquisition into the question of damages. The proceedings were had under the General Mill Act of the state of New Hampshire, passed in 1868. Both parties demanded a trial by jury,, which resulted in a verdict for Dow of $1,500. The only objection in the case was as to the addition to the verdict of fifty per cent. under a provision of the statute. It could not be claimed that the right to maintain the dam was one under any provision in the National Constitution, nor that the method prescribed by the law for assessing the damages was repugnant to any provision in that Constitution. Therefore it was truly said that the decision of the Supreme Court of the state that the Electric Co. was bound by the provision in the law relating to the assessment of damages was not based on any Federal question, and the writ of error was dismissed. The decision has no application to the present case, nor has either of the three cases cited in it.

18. The present case falls within decisions of this Court in which its jurisdiction has been sustained.

87 U. S. (20 Wall.), 445, Home Insurance C. vs. Morse.

In that case a statute of Wisconsin provided that it should not be lawful for any foreign fire insurance company to transact business in Wisconsin, unless it should first appoint an attorney in that state upon whom process could be served, and file a written agreement that it would not remove a suit for trial into the Federal Courts. The Home Insurance Company made such an appointment, and filed the agreement required. When sued on a policy in a Court of the state, it filed its petition for removal into the Federal Court. The State Court refused to allow the removal, proceeded with the trial, and gave judgment against the company. The Supreme Court of the state affirmed it. Upon writ of error from this Court, the judgment was reversed. This Court decided that the Constitution of the United States secures to citizens of another state than that in which suit is brought, the right to remove their cases to the Federal Court, that the statute of Wisconsin, which sought to prohibit such removal, was repugnant to the Constitution and was void, and that the agreement by the Insurance Company under the statute derived no support from the unconstitutional statute, and was void.

We have in that case one in which the Insurance Company could not do business in the state of Wisconsin at all without the consent of the state. The state gave its consent, and annexed to it the condition that the company should surrender its right under the Constitution. The company accepted the statute, engaged in business in the state, and filed the agreement in writing against removal, which the statute required. This Court decided that the company was not bound by the unconstitutional condition imposed by the statute, and expressly assented to by the company, and found in the decision of the Wisconsin Court, as to the effect and operation of the state law and its acceptance by the company, a Federal question for review by this Court, and reversed it.

In *121 U. S., 186, Barron vs. Burnside*, a similar decision affecting a statute of the state of Iowa was made.

In *146 U. S., 202, the Southern Pacific Co. vs. Denton*, this Court decided that a state statute requiring a corporation, as a condition to obtaining a permit to do business within the state, to surrender a right secured to it by the Constitution of the United States, is unconstitutional, and gives no validity or effect to any agreement or action of the corporation in obedience to its provisions.

The decisions in these three cases are against the claim on the part of the state that the Railroad Company in this case is subject to the unconstitutional provisions, and to the enforcement of the unreasonable rate because of its incorporation, and against the point by counsel for defendant in error that the decision of the Supreme Court of Michigan involves no Federal question, and is final, and that this Court has no jurisdiction.

19. The decision of the State Court relates only to the objection that the rate is unreasonable, and that the enforcement of it would deprive the company of its property in violation of the Fourteenth Amendment. The points decided were, (1) that a state statute imposing unreasonable rates would, under the decisions of this Court, be unconstitutional only as to existing corporations; (2) that the rate in question could not be enforced upon the original company organized before the amendment of the statute; (3) that it was competent for the Legislature to make the acceptance of unreasonable rates a condition of incorporation by the purchasers of the property on mortgage sale.

We have argued that the question so decided is Federal in its character, and that it involves the Federal questions raised by the defendant in the case.

If it should be held otherwise, it would not be sufficient to dispose of the case. It would affect only the objection based upon the unreasonableness of the rates. It would not affect the other Federal questions that the statute, as construed, is under the decisions of this Court repugnant to the Fourteenth Amendment (Assignments of Error II and III), and to the

Commerce Clause. (Assignment of Error VI.) It has not been decided by the State Court upon any ground, and could not be, that the defendant, by its incorporation in 1896, became bound by the construction given to the statute in 1901 by the decision that gross earnings must include interstate earnings, and that it is precluded from the objection that that decision gave to the statute a construction which placed it in conflict with the commerce provision in the Constitution. This question enters essentially into the other one as to the unreasonableness of the rates. If it is not competent, under the Constitution, to include earnings from interstate business in the computation for the purpose of fixing rates of domestic fares, the earnings of this company would be less than $2,000 per mile, and the terms of the statute, as amended, would not be applicable to its business There would, in that case, be no ground for any proceeding to enforce the two and a half cent rate on the defendant.

We submit, that the State Supreme Court did not decide the case upon a non-federal question not involving the Federal questions asserted by the plaintiff in error upon the record, and sufficient to support the judgment independent of those questions, and that this Court has jurisdiction to review the judgment.

T. J. O'BRIEN,
JAMES H. CAMPBELL,
For Plaintiff in Error.

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Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 61.

THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS OF THE STATE OF MICHIGAN.

Reply Brief for Plaintiff in Error.

T. J. O'BRIEN,
JAMES H. CAMPBELL,
For Plaintiff in Error.

6976

In the Supreme Court of the United States.

October Term, 1903. No. 61.

GRAND RAPIDS & INDIANA RAILWAY COMPANY,
Plaintiff in Error,
vs.
CHASE S. OSBORN, Commissioner of Railroads for the State of Michigan,
Defendant in Error.

Reply Brief for Plaintiff in Error.

The plaintiff in error has already filed two briefs, which no doubt fairly cover the points in controversy. An additional brief having been filed by the other side, it will be considered sufficient to add a short memorandum to the matter already before the Court.

The additional brief, at page 2, refers to the comparative conditions of the respondent company and other companies in the state. It should be said that the respondent is a north and south road, and is not what might be termed a trunk line. Its chief competitors are the Pere Marquette and the Jackson, Lansing & Saginaw, both of which extend in practically parallel courses—the former to Petoskey, on Little Travers Bay, and the latter to Mackinaw, on the Straits. These lines, with some others less important, are the chief competitors of the respondent, and all are at liberty to charge three cents per mile, their earnings not having reached the $2,000 limit.

Respondent's line was originally the Grand Rapids & Indiana Rail*road* Company, while the reorganized company is different only in respect to its being Rail*way*.

For convenience, the following data may well be repeated here:

Oct. 1, 1869, the first mortgage, $5,375,000 of which is still unpaid.

Aug. 1, 1884, an additional mortgage of $3,000,000.

On the same date, a third mortgage, with a limit of $10,000,000.

Aug., 1889, the section of the General Railroad Law amended, having reference to rates.

July, 1896, reorganization took place.

March, 1901, decision of the Supreme Court of Michigan, holding that interstate earnings should be included.

Two questions only, need to be here noticed.

First, in arriving at the gross earnings of respondent's passenger trains, was it proper to include interstate earnings?

Second, shall respondent be denied the benefit of the Fourteenth amendment to the Federal Constitution?

The first point was discussed in the principal brief filed by the respondent, at page 14, and following. Counsel seeks to sustain this action under the authority of Home Life Insurance Co. vs. New York, 134 U. S., 549, and Maine vs. Grand Trunk Railway Company, 142 U. S., 217. It has already been pointed out that these cases are not applicable to the present record. The case in Maine related to the state's revenues, and the question was whether interstate earnings might be used as a basis for arriving at a suitable tax. The doctrine was carried to its fullest extent in that case, as may be inferred by the dissent of four of the members of the Court. The present question, as has been urged, can be likened to Smith vs. Ames, in 169 U. S., 466, and the cases therein cited. This case, as distinguished from those cited, has reference to the limitation of earnings, and it seems to us that the doctrine is sufficiently well settled that for such purpose the receipts from domestic service alone may be considered. If

the Court should sustain our view, it would follow that, since without interstate earnings the gross receipts were less than $2,000 per mile, the initial proceeding was without warrant, and should now be dismissed.

Second. The other point has reference to the status of the mortgagees of this property after they had foreclosed the equity of redemption. The other briefs cover the argument and citation of cases, and a brief memorandum need only be given here.

It is conceded: 1st. That an appeal to the Federal Constitution would have been open to the Grand Rapids & Indiana Rail*road* Company if no foreclosure had taken place.

2nd. Also to the purchasers (bondholders) at the foreclosure sale, if they had not made the certificates of reorganization.

3rd. That the rate fixed by law is unreasonable, and would be void under the Federal Constitution, if the respondent was free to claim the protection of that instrument.

It must be borne in mind that the laws of Michigan were generous in providing that railraod corporations might borrow money, issuing their bonds therefor, and securing such bonds by mortgage upon their property. The state was also careful to provide for an easy method of taking over the property in case the mortgagor should default. These provisions are found in the Act of 1873, and even anterior to that time. In case the bondholders should take the place of the stockholders upon foreclosure, and join in the simple certificate provided for, the corporation thus formed should have "the same rights, powers and privileges as are or may be secured to the original company whose property may have been sold under and by virtue of such mortgage or trust deed."

Counsel for the state, however, relies upon the concluding words in the clause, which says that such corporations should thereupon be complete, "with all the powers and rights secured to railroad companies under this act, to all the provisions of which and amendments thereto, it should be subject."

The contention is, that because the law was amended after the mortgage took effect, and before the reorganization, the reorganized owners were bound by the intermediate amendment, and should be denied an appeal to the Federal Constitution. It seems to us that the argument of counsel is entirely fallacious, and that the cases cited by him are not applicable.

We need not urge that an appeal to the Federal Constitution is open to all railroad corporations at any time when it may be shown in any particular case that the limitation of its charges amounts to the taking of its property without due process of law, and a denial of the equal protection of the law.

It will be sufficient for us to say that when the company borrowed money and issued its bonds as evidence thereof, and secured the same by a mortgage on its property, the holders of these securities obtained a continuing interest in the property, a standing which the Court would have recognized at any time, and that the sheltering arm of the Federal Constitution continued to protect them when through misfortune they were compelled to become the owners of the property itself. We need not urge that the state made a contract with these parties in respect to amendments. It will be sufficient for us if it shall be held that the law which promised them protection was not a mere delusion, and that instantly they took the property under the mortgage they were not subject to the confiscation of their security, if the intermediate amendment should amount to that.

Suppose the amendment had required that passengers be carried at a half cent per mile—a rate which, if enforced, would result in a substantial loss for each passenger carried. The bondholders, before foreclosure, could have resisted this limitation. Why should they not have the same protection after the re-incorporation as before?

The difference between the case at bar and the one supposed, is one of degree only, since the demurrer admits that the rate fixed by the amendment is an inadequate one.

We admit that the Legislature might amend the statute in

respect to rates, and that such amendment would be binding upon the old company as well as the new, but we claim the same protection as the old company if the amendment should be vicious and destructive, and amount to a denial of reasonable compensation in the operation of the property.

It is idle to urge that the bondholders, after the foreclosure, could have continued to operate the property as partners. It was necessary in their own interest to create a corporate identity under which the business could go forward. It was necessary in the public interest that some responsible body should be within easy reach to be coerced into a compliance with police regulations, and to be answerable in the Courts. Moreover, the first or prior mortgage was still outstanding, and without a reorganization, the holders of the bonds secured thereby would have promptly applied for a receiver. They were therefore obliged to incorporate, and it seems to us that the Court would be slow to penalize them in the way proposed for so doing.

The statute invoked by counsel does not in terms bear out his argument, and we have yet to find a case binding upon this Court which sustains that doctrine.

See

Home Insurance Co. vs. Morse, 87 U. S. (20 Wall.), 445.

Southern Pacific Co. vs. Denton, 146 U. S., 202.

Barron vs. Burnside, 121 U. S., 186.

Counsel makes reference to three cases, but it seems to us that neither of them affords any support to his contention. We are content to invite a careful scrutiny of those authorities.

The point made by counsel that the Supreme Court of Michigan passed upon a controlling domestic question, and that therefore this Court will not take jurisdiction, has been already discussed in the preceding briefs. None of the points passed upon or decided by the Supreme Court of Michigan is one of state or local law. They are upon their face necessarily Federal questions. A possible point in the record

which might be said to be local was not decided by the Court. Even that question, however, would have been local only so far as it related to rights or privileges derived from the state exclusively, and depending entirely on state laws. But the rights insisted upon here are not derived from the state, they are rights which it has under the National Constitution, and could not be interfered with or restricted in any state law, or by any construction of such law which the state Courts might give.

It has these rights quite independent of any provision in the state statute, as the owner of the property in question.

The record shows that the company has nearly $6,000,000 of capital stock. It has been noted that when the second, or $3,000,000, mortgage was foreclosed, there was a third mortgage outstanding. More than $4,000,000 of bonds had been issued under the latter, and at the time of foreclosure, these bonds, with a large arrearage of interest, were owing. There was also a considerable floating debt. It was considered equitable to recognize these holdings, and this could be only done in the way of stock in the new company. That course was taken, and the capital stock was thus fully paid.

T. J. O'BRIEN,

JAMES H. CAMPBELL,

For Defendant in Error.

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JAMES H. McKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 61.

THE GRAND RAPIDS & INDIANA RAILWAY COMPANY,
Plaintiff in Error,

vs.

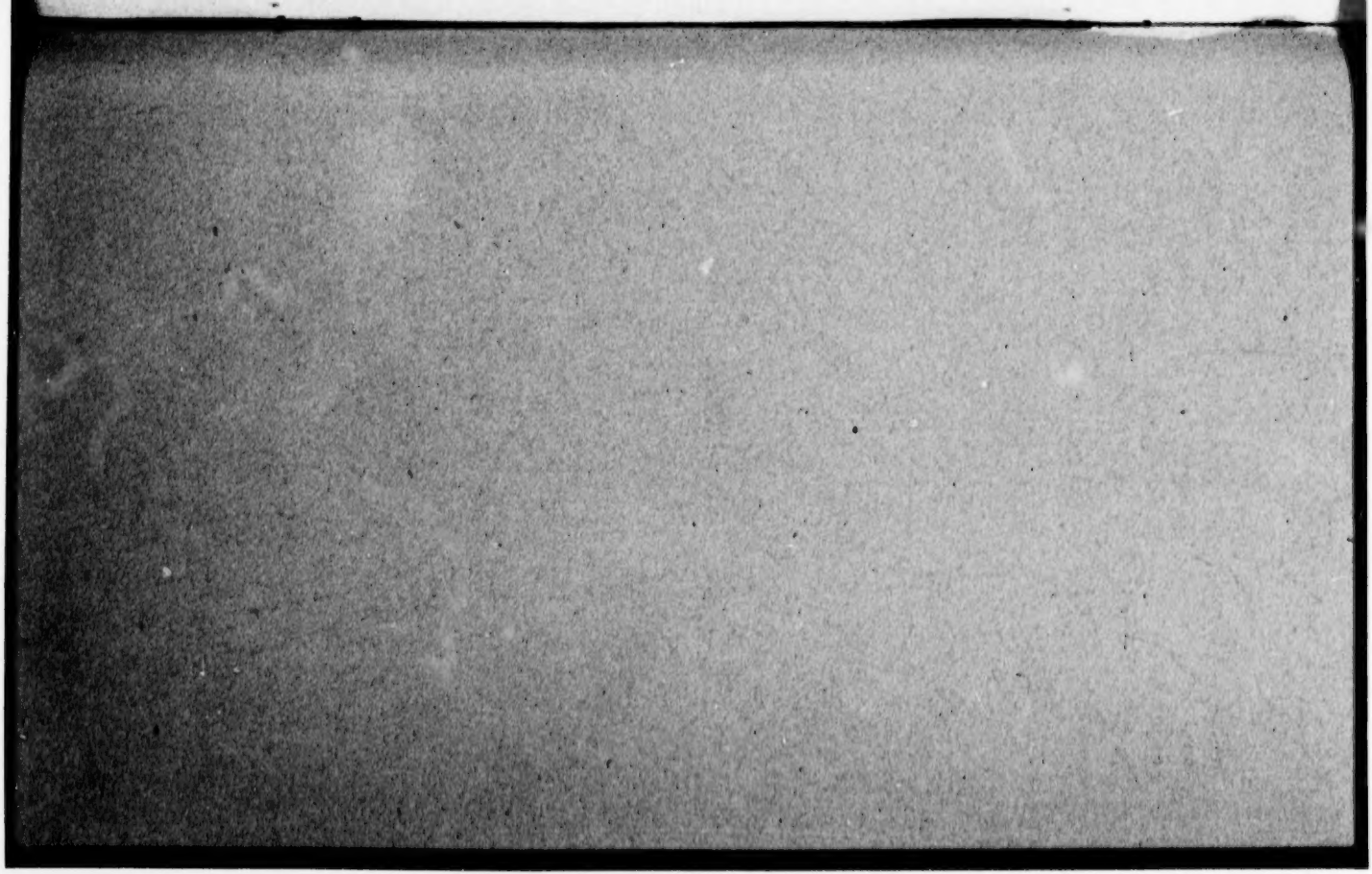
CHASE S. OSBORN, COMMISSIONER OF RAILROADS OF THE STATE OF MICHIGAN,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

CHARLES A. BLAIR.
Attorney General of Michigan,
Solicitor for Defendant.

HORACE M. OREN,
Of Counsel.



SUPREME COURT OF THE UNITED STATES,

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

1. The Grand Rapids & Indiana Railway Company, appellant in this case, was organized on July 11, 1896, by one John C. Sims, and others, under and pursuant to the provisions of the general railroad law of the State of Michigan,

being Act No. 198 of the Public Acts of the State of Michigan for 1873 and the several amendments thereto; and the purposes of the organization were: first, to own, maintain and operate the railroad running from Mackinaw City, Michigan, to Fort Wayne, Indiana, previously constructed and owned by the Grand Rapids & Indiana Rail*road* Company; and second, to take over, maintain and operate various leased lines which the Grand Rapids & Indiana Rail*road* Company has held and operated as lessee.

2. Prior to the organization of the respondent company, the Grand Rapids & Indiana Rail*road* Company has issued two sets of mortgage bonds; the first dated October 1, 1869, and amounting to $5,375,000, and the second, August 1, 1884, and amounting to $3,000,000.

3. In or about the year 1896 the mortgage given to secure the second series of bonds was foreclosed by proceedings instituted in the Circuit Court of the United States for the Western District of Michigan and the District of Indiana, and, on June 10, 1896, a sale of the property of the company had. John C. Sims became the purchaser upon this sale for the sum of $500,000, his title being subject to the underlying first mortgage bonds.

4. The general railroad incorporation law of the State of Michigan above referred to contained the following provision, viz.:

> "In case of the foreclosure and sale of any railroad, or part of any railroad, under any trust deed, or mortgage given to secure the payment of bonds sold to aid in its construction and equipment, or for other cause authorized by law, it shall be competent and lawful for the parties who may become the purchasers, and such others as they may associate with themselves, to organize a corporation for the man-

agement of the same, and issue stock in the same in shares of one hundred dollars each, to represent the property in said railroad; and such corporation when organized shall have the same rights, powers, and privileges as are or may be secured to the original company whose property may have been sold under and by virtue of such mortgage or trust deed. Such organization may be formed by virtue of a declaration or certificate of the purchasers at the sale under said mortgage or trust deed, which shall set forth the description of the property sold, and the date of the deed under which it was sold, or of the decree of the proper court, if it shall have been sold by virtue of a decree of any court; and with such description of the parties to the deed or suit as may identify the one or the other, or both; the time of the sale, and the name of the officer who sold the same; and also the purchasers, and the amount paid, and the stockholders to whom stock is to be issued, and the amount of the capital stock and the name of the new corporation, and such other statements as may be found requisite to make definite the corporation whose property may have been sold, and the property sold as well as the extents and rights and property of the new company; which said certificate or declaration shall be signed by all of the said purchasers, and shall be addressed to the Secretary of State; and being filed and recorded in his office, the said corporation shall become complete, with all the powers and rights secured to railroad companies under this act, *to all the provisions of which, and amendments thereto, it shall be subject,* and a certified copy of the said certificate or declaration shall be *prima facie* evidence of the due organization of said company."

Sec. 2, Art. I, Act 198, P. A. 1873.

It was under this provision that Mr. Sims and his associates organized the Grand Rapids & Indiana Railway Company in June of 1896.

5. Among the amendments to Act 198, P. A. 1873, above referred to, to which the newly organized company *became subject*, was the following:

ARTICLE II.

* * * * * *

"Sec. 9. Every such corporation shall possess the general powers *and be subject to the liabilities and restrictions following*: that is to say:

* * * * * *

Ninth, To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, shall not exceed the following prices, viz.: For a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger trains, as reported to the Commissioner of Railroads for the year one thousand eight hundred and eighty-eight, equaled or exceeded the sum of three thousand dollars for each mile of road operated by said company, two cents per mile, and for all companies, the earnings of whose passenger trains reported as aforesaid, were over two thousand and less than three thousand dollars per mile of road operated by said company, two and a half cents per mile, and for all companies whose earnings reported as aforesaid were less than two thousand dollars per mile of road operated by said

company, three cents per mile: *Provided, That in future, whenever the earnings of any company doing business in this State, as reported to the Commissioner of Railroads at the close of any year, shall increase so as to equal or exceed the sum of two thousand* or three thousand dollars per mile of road operated by said company, *then in such case said companies shall thereafter, upon the notification of the Commissioner of Railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half*, or two cents per mile, *as hereinbefore provided:* Provided, That roads in the Upper Peninsula, which report as above provided, passenger earnings exceeding three thousand dollars per mile, shall not charge to exceed three cents per mile, and roads reporting less than three thousand dollars per mile shall be allowed to charge not to exceed four cents per mile."

The above provision was incorporated in the general railroad law by an amendment made in 1889. (P. A. No. 202.) Previous to 1889 it may be said that a rate of three cents per mile for the carriage of passengers had been the customary maximum rate.

6. Under the provisions of the general railroad law above quoted, the respondent company reported annually to the Commissioner of Railroads the earnings of its passenger trains for each mile of road operated by it, and its report for the year ending December 31, 1900, showed that the total earnings of its passenger trains in the State of Michigan for said year was $976,843.87, and that for each mile of road operated the earnings amounted to the sum of $2,243.24. In previous years the earnings per mile had been reported as less than $2,000, and the company had charged for passenger fares the rate of three cents per mile.

It may also be stated that in accordance with the construction placed upon this law by the Commissioner of Railroads and sanctioned by the State Supreme Court, the passenger earnings reported, from which the earnings per mile in Michigan was computed, consisted, first, of the purely domestic or State earnings where passage commenced and ended in the State, and second such proportion of the interstate earnings as represented the ratio which the mileage of road operated in Michigan, bore to the entire mileage. The total of these two was divided by the Michigan mileage to get the earnings per mile which the statute contemplated as the measure to determine the maximum rate of fare permissible.

It may further be noted that under the construction of the law sanctioned by the Supreme Court of the State of Michigan, there are included in these earnings which are reduced to a mileage basis, moneys received on account of express, baggage, mail and other services appertaining to passenger trains and the passenger business of the road.

7. The respondent company, by reason of its passenger earnings having increased so as to exceed the sum of two thousand dollars per mile, but being still less than $3,000 per mile passed at the end of the year 1900 into the two and one-half cent class, and, on July 11, 1901, the relator who then occupied the position of Commissioner of Railroads, gave the notice requisite under the statute to require it to thereafter only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half per mile.

8. The respondent company refused to comply with this order, and the Commissioner filed in the Circuit Court for the County of Kent, a petition for a writ of mandamus to compel obedience to the order. His petition set up the essential facts necessary to the stating of his case. An order

was made to require the respondent to show cause why the writ should not be granted, and was duly served.

9. Respondent filed an answer to relator's petition, showing cause why the writ should not issue. The matters herein previously stated were set forth, and four points were made which may be summarized as follows:

First. It alleged that the reduction of passenger fares from three to two and one-half cents per mile would deprive it of a reasonable compensation for the services to be performed, and that the operation of the law enforcing the reduction would deprive it of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Second. Inasmuch as the Supreme Court of the State of Michigan in the case of Wellman vs. Chicago and Grand Trunk Railway Company, 83 Mich. 592, had construed those portions of the ninth subdivision of Article II of the general railroad act of Michigan, to be a fixed and conclusive determination of passenger rates by the legislature of the State into the reasonableness or unreasonableness of which, as affecting the earning power of the railroads made subject thereto, the courts were precluded from inquiring, it claimed that the provision requiring a reduction of passenger fares was unconstitutional and void, for the reason that railroad companies made subject thereto are denied the right to a judicial determination of the reasonableness of the rates imposed, and without which right the law would violate the Fourteenth Amendment of the Constitution of the United States in the clause that forbids the taking of property without due process of law.

Third. That the provision of law in question provides for an arbitrary and unequal classification of rates of passenger fares and violates the provision of the Constitution of the United States found in the Fourteenth Amendment, which inhibits the States from denying to persons within their jurisdiction the equal protection of the laws.

Fourth. It claimed that because the legislation in question had predicated the reduction of rates of fare partially upon the amount of interstate passenger earnings received by a railroad company, that the provision operated as a regulation of commerce among States, and consequently was in conflict with the provision of the Constitution of the United States restricting such power to Congress.

10. On the coming in of this answer, relator filed a demurrer thereto, which in substance alleged that, inasmuch as the scale of passenger rates permissible and the conditions of their reduction were a part of the act under which respondent had been incorporated in 1896, it could not be permitted to question the operation of the law to which it owed its creation.

11. On demurrer the case was heard in the Circuit Court. The demurrer was sustained, and the writ ordered to be issued.

12. Respondent took the case by writ of certiorari to the Supreme Court of the State, and upon hearing the judgment of the Circuit Court was affirmed.

13. The case comes to the United States Supreme Court on writ of error, the assignments of error amounting practically to this single contention, viz.:

That the fact of incorporation in 1896, under the act in question and under the circumstances set forth in its answer cannot be held to deprive respondent of its right to the protection guaranteed under the provisions of the Constitution of the United States invoked in its answer.

It is to this issue that this brief is chiefly directed, although appellee does not concede that the Supreme Court of Michigan passed upon a Federal question in rendering its judgment, and a portion of the brief is devoted to that proposition.

ARGUMENT.

The provisions of the fourteenth amendment to the constitution of the United States invoked by appellant authorize no interference with the operation of rates or schedules established by railway charters or incorporation laws in cases where the corporation complaining accepted the charter or voluntarily organized under the act establishing the rate or schedule.

The appellant has invoked two provisions of the Fourteenth Amendment to the Constitution of the United States to relieve it from the operation of the railway incorporation law under which it is organized and under which, unless these provisions inhibit, it has become liable to reduce its Michigan passenger rates from three to two and one-half cents per mile, viz.:

First. The provision of Article XIV, Section I of the Amendments to the Constitution which provides that no State shall deprive any person of property without due process of law;

Second. The further provision of Article XIV, Section I of the Amendments, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Taking up the first of the provisions mentioned, this point is made regarding the class of State acts that have been relieved against.

No instance has been found by appellee where, by virtue of the provision of the Constitution of the United States inhibiting a State from depriving any person of property without due process of law, a railroad or other corporation has been granted relief from obedience to its charter or organic act.

Uniformly it will appear in adjudicated cases that redress has been sought against obligations or restrictions attempted

to be imposed upon corporations already created, through amendments to their charters or by general laws of subsequent enactment, designed to be enforced regardless of the will or assent of the corporation affected, and the operation of which is claimed will or does deprive the corporation of its property or its reasonable earnings.

It would be a work of supererogation to demonstrate this proposition by reference to the adjudicated cases. The principle is too well understood and too self evident to require the reference.

Whether or not railways shall be chartered or incorporated at all, is a matter of public policy solely for legislative determination. Whether the terms of incorporation to be offered shall be advantageous or disadvantageous to those who may wish to incorporate, is equally a matter of public policy. They are free to accept or refuse as their interests may dictate. The benefits and burdens of the incorporation law are susceptible of ascertainment and measurement before acceptance thereof or action thereon.

Hence it is that they who incorporate are bound by the terms of their charter or incorporation law. The constitutional provision under consideration was not intended to operate as a bankruptcy provision against improvident contracts nor to relieve from a diminution of property and earnings through the operation of State laws to which the owner of the property had assented.

The principle is forcibly put in the case of San Diego Land and Town Company vs. City of National City, 74 Fed. Rep. 79, in which the complainant company sought to have held invalid as violative of the provision of the United States Constitution under consideration, a provision of the Constitution of California and an act thereunder under which the complainant had acquired its property and rights. The Court says:

> "In the present case the complainant came into the State of California, and acquired the water and water

> rights which form the basis of its suit under and by virtue of laws passed pursuant to that provision of the Constitution of the State which it now seeks to assail as being contrary to the provisions of the Constitution of the United States. To permit the complainant to do this would, in effect, be to permit it to rely upon the Constitution and laws of California, as a valid basis for the acquisition of its asserted rights, and at the same time to treat as void the same provisions, where they impose a burden in connection with those rights. The complainant cannot be permitted to thus blow hot and cold in the same breath. If it was not willing to subject itself to the burden imposed by the Constitution and laws of California upon all persons and corporations appropriating water in the State for distribution and sale, it should not have come, as it did, into the State, and availed itself of the rights of appropriation conferred by the same Constitution and laws. Taking those benefits, it assumed the corresponding burdens, and will not be heard to assert the one and repudiate the other." (74 Fed. Rep. 81.)

It may be said, however, in respect to the case cited that the right to have relief from unreasonable water rates fixed by the officers provided for in the act in question was sustained. But had those rates been fixed in the organic act itself as in the Michigan railroad law the principal to be found in the quotation would have debarred further inquiry or redress. If in the Michigan law discretionary power was vested in the Commissioner of Railroads to determine when a rate should be reduced, the Constitutional provision might possibly be invoked against his action if his reduction deprived the railroad affected of reasonable earnings.

But where the bargain was made that railroad organization might be had if the company should agree that its future rates of fare might be fixed by reference to its own reports

of facts, with absolutely nothing left to the discretion of the officer who is charged with the enforcement of the law, the operation of the law is made binding upon the railroad company by the act of organizing under the law. The diminution of property occasioned by the operation of the law is by its own consent. The Constitutional provision invoked is entirely inapplicable. An application of the principal here invoked is to be found in the case of Dow vs. Electric Company (N. H.) 31 Atl. Rep. 22, which was reviewed in this Court (166 U. S. 489).

In this case the electric company under the laws of New Hampshire was given authority to institute condemnation proceedings. A condition of the exercise of the right expressed in the law was that 50 per cent should be added to the award of the jury. The company instituted the proceedings and obtained the award of the jury, but objected to the adding of the 50 per cent, on the ground that the provision that authorized it was in contravention of the Constitution of the United States.

The New Hampshire Court says:

"When a legislative grant of authority to exercise the power of eminent domain contains a condition that the grantee shall pay more than the value of the property taken under the power, *the grantee accepting the grant and exercising the power cannot question the constitutionality of the condition.* * * * The statute is permissive. It confers a privilege which the defendants were at liberty to exercise or not, as they saw fit. But they cannot take and enjoy the benefit without performing the condition on which it is given. By their exercise of the power conferred, flowing the plaintiff's land, and applying for an assessment of the damages, they are precluded from denying the validity of the condition. *The question of its constitutionality under either the Federal or State Constitution is not open to them.* Pitkin vs.

City of Springfield, 112 Mass. 509; Deverson vs. Railroad Company, 58 N. H. 129, 131, and cases cited; Dodge vs. Stickney, 61 N. H. 607, 610, 611; People vs. Murray, 5 Hill. 468, 472. The defendants objection that the statute is in conflict with both constitutions or either of them is overruled." (31 Atl. Rep. 23.)

The United States Supreme Court in passing upon the case says:

"We agree with the Supreme Court of New Hampshire in thinking that the plaintiff in error, by availing itself of the power conferred by the statute, and joining in a trial for the assessment of the damages, is precluded from denying the validity of that provision which prescribes that fifty per cent shall be added to the amount of the verdict. The act confers a privilege, which the plaintiff in error was at liberty to exercise or not, as it thought fit." (166 U. S. 490.)

2. The feature of the Michigan railroad law, which provides for the graduation of rates of fare for the carriage of passengers by the per mile passenger earnings of the roads subject to the act, is attacked by respondent as violative of the provision of the Constitution of the United States, which inhibits a State from denying to any person within its jurisdiction the equal protection of the laws.

The classification that the State has thus made is attacked as arbitrary and neither just nor reasonable, and its operation is impugned as resulting in unequal privileges to different corporations that in justice should be on the same basis.

But in reviewing the cases where classifications made by or through State authority have been attacked as violative of the constitutional provision under consideration, the same fact appears that did in the cases arising upon the application of the provision regarding the deprivation of property

without due process of law. None of the classifications that have been declared arbitrary and unreasonable and violative of the constitutional provision have been classifications found in the laws authorizing the creation of corporations. They have been found either in laws designed to impose burdens other than those found in charters or organic acts and voluntarily assumed by incorporation thereunder.

It certainly cannot be claimed that a State is bound by this constitutional provision to extend the same terms to each and every corporation that it may see fit to create. If so the right of a State to grant special charters was annihilated by the adoption of the Fourteenth Amendment. Justice Brewer in a dissenting opinion rendered in the case of Magoun vs. Illinois Trust & Savings Bank, 170 U. S. 283, 302, 300, in which was under consideration, the right to graduate the inheritance tax upon legacies to strangers to the estate, states the principle here contended for. He says:

> "There are doubtless some matters over which the State has purely arbitrary power. For instance, it is under no obligation to grant any charters, and the legislature may undoubtedly, in giving a charter to one set of persons impose one series of burdens, and in granting a similar charter to another set may impose entirely different burdens. But these are cases of mere gratuities, mere favors and privileges, and any donor of such may add to them the burden he pleases." (170 U. S. 302.)

The statement as relates to the case decided was dictum, but its authority is in no wise weakened by the majority opinion of the court. The proposition is incontrovertible.

The possible unequal operation of the Michigan railroad law was apparent after the incorporation of the provision complained of in 1889. It must have been known by those who wished to incorporate thereunder that their rates of passenger fare might be more or less than others who had

or should incorporate under the act, dependent upon the amount of their passenger earnings. If they deemed the possible discriminations not to be based upon rational grounds, they were free not to come under the act. They assent to the unequal burdens imposed by the law if they come under it. For the respondent to now be permitted to complain of the terms of the act under which it voluntarily organized and to invoke against the enforcement of its obligations the Constitutional provision now under consideration would logically sanction the denial of any contract because some one else had been permitted to contract on more favorable terms. The purpose, the scope and the intent of the Constitutional provision applies and is intended to apply to no such conditions as here exist.

The argument upon this point thus far has assumed that the graduation of passenger fares contained in the railroad incorporation law of Michigan is upon an arbitrary basis, and that in its operation it may result in unequal privileges and arbitrary discriminations. The assumption, however, is unwarranted if the actual terms of the act are examined and considered.

The graduation of passenger fares by the amount of passenger earnings is both just and reasonable. The classification rests upon a difference which bears a reasonable and just relation to the act in respect to which the classification is made. There is equality between the classes created.

The operation of the law is exactly the same as a graduated inheritance tax, with the tax at a greater rate for such portions of the inheritance as exceed a certain amount. The value of the franchise to charge for the transportation of passengers is measured by the number of passengers traveling or the number of fares received. As the total of earnings increase fares are required to be lowered, and thus a greater amount compelled to be yielded up by the railroads for the benefit of the public. As in the inheritance tax, the greater the benefit the greater the burden imposed.

The law laid down by the majority of this court in the

case of Magoun vs. Illinois Trust & Savings Bank above quoted, is applicable to the case at bar. The court says:

> "The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat 'all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality, nevertheless they are universally imposed and their legality has never been questioned. We think the classification of the Illinois law was in the power of the legislature to make, and the decree of the Circuit Court is affirmed." (170 U. S. 300.)

II.

The commerce clause of the United States constitution is not infringed by the provisions of the Michigan railroad law providing for the adjustment of passenger rates.

Thus far has been considered the claim of the respondent that its rights guaranteed under the Fourteenth Amendment to the Constitution of the United States have been violated. The answer has been that these rights were personal and were subject to voluntary waiver, and that the

acceptance of privileges conferred by an act of incorporation by organizing thereunder, was a waiver of and operated as an estoppel against an appeal to the protection of these constitutional provisions.

It must be admitted, however, that the commerce clause is of an entirely different character from the Fourteenth Amendment. It is an allotment of governmental power, a statement of a division between Federal and State jurisdiction and authority. The doctrine of estoppel cannot be held to have the same force in cases where this provision of the Constitution is invoked.

It is not contended in this brief that, if a State prescribed or sought to prescribe, as a condition for the creation or existence of a corporation designed to engage in commerce between the States, that it should not be subject to the laws of Congress as respects such commerce or that it must act in violation of such laws, there would be any question, but that the courts would hold the authority of Congress paramount.

Whether or not a corporation that had accepted such a questionable commission as a part of its charter or oganic law, could, in a dispute solely between itself and the State that created it, allege the invalidity of any part of its charter, may admit of doubt; but certain it is, that before it could avail itself of such a defense it would have to show conclusively that the provision objected to did infringe upon the legitimate powers of the paramount sovereignty.

Let us consider, therefore, the effect upon State authority of this commerce clause found in the Constitution of the United States.

In the case of Covington and Cincinnati Bridge Company vs. Commonwealth of Kentucky, 154 U. S. 204, Justice Brown, in reviewing the adjudications of the United States Supreme Court with respect to the power of the States over the general subject of commerce, divides them into three classes, viz.: First, those in which the power of the State is held to be exclusive; second, those in which the

States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive, and the States cannot interfere at all.

Under the first class he enumerates the power to authorize the construction of highways, turnpikes, railways and canals between points in the same State, and to regulate the tolls for the use of the same.

The commerce clause by its terms excludes commerce entirely within a single State, and without statement of authorities it may be said that a State has undoubted and exclusive authority; first, to create corporations to engage in domestic or intra-State commerce; second, to prescribe such rates of toll for the carriage of such commerce as it may see fit, either by the terms of the original charter or incorporation act, or by amendment thereof, if the right to amend is reserved to the State. The only limitation upon the authority is that the right of amendment shall not be unreasonably exercised.

But that States have and may lawfully exercise powers that in a measure affect commerce between the States, either through the non-action or the concurrence of Congress, is manifest by reference to the cases and instances cited by Justice Brown in the enumeration of cases under his second class above referred to. One instance of the exercise of powers by the State he does not refer to as fully as might be. That is the power of the State to create corporations to engage in the business of interstate commerce. Congress has chartered one or two railroad companies under exceptional circumstances, and numerous bridge companies to build bridges over navigable streams that form State boundaries. But the great bulk of corporations chartered or organized to carry on commerce intra-State and interstate, owe their origin to State authority. Railroads are often incorporated in one State to extend into some other or several other States and extra territorial effect is given to the law under which they were created by the acquiescence of the other State or by the operation of State comity; or by con-

current laws the corporation is given equal life and equal powers in separate sovereignties. Congress has never denied to the States this right and until it does deny the right, by itself assuming it or by prohibiting it to the States, the right of the latter cannot well be challenged.

But as incident to this undoubted power to create corporations to engage in interstate commerce, does the State have authority in the charter or by the terms of the incorporation acts to prescribe the terms and conditions upon which such commerce shall be engaged in; or to be more specific, can they say to a corporation thus to be created, "you may not have the benefit of this incorporation act unless you engage to carry at certain rates the commerce which we will give you authority to carry."

Upon this proposition the following authorities are advanced:

Camden & Amboy Railroad & Transportation Company vs. Briggs, 22 N. J. L., 623, 651.

Railroad Company vs. Maryland, 21 Wallace, (88 U. S.) 456-473.

Covington & Cincinnati Bridge Company vs. Kentucky, 154 U. S. 204, 223.

In the case of Camden & Amboy Co. vs. Briggs, the company was chartered by the legislature of New Jersey to perfect an expeditious and complete line of communication between New York City and Philadelphia. To facilitate the objects of the act it was authorized to construct a railroad from the Delaware river to a opint on Raritan Bay. It was required to provide suitable vessels at either extremity of the road for the transportation of passengers and produce from city to city. It was limited to its charges for freight and pas-

sengers. The charter granted powers to do acts outside the State, and the limitations as to charges was held applicable to the entire route. The court says:

> "But it is objected that the granting this power, and the restrictions thereon to operate upon the water as well as upon the land, is an interference with the Constitution as expounded by the Supreme Court in Gibbons vs. Ogden, 9 Wheat. 1. * * * But it was never pretended in that case that a State legislature could not charter a company to navigate the waters in any State, or even the ocean itself. If the company seek the protection and security of a State charter, they are bound, as a company, by the restrictions and penalties of that charter, and of the the legislature that grant it, though any individual member of the company may exercise the right of a citizen, and do the same thing on his own responsibility without restriction; and this in no way interferes with the Constitution or the exclusive powers of Congress; it is no restriction of commerce or of the rights of individuals; no exclusive grant or prohibitory use of the waters within or without the State; no imposition of taxes, duties, imposts or excises on vessels, or the cargos thereof, but simply a power granted to a corporation, and a restriction thereon by the granting power; not intended to operate on the persons of individuals, or their vessels or property, but simply on the corporation itself, on whom is conferred the right, imposed the duty, and is added the restriction. An individual, it has been urged, may do the same things unrestricted, for the waters are free. True, but when a company of individuals ask of a State a portion of its sovereign power to enable them, by land and water, to complete a line of communication between New York and Philadelphia, and to do this not under their individual

> names and responsibilites, but like a sovereign, with its capacity to act under its own seal in its corporate name, they cannot complain if the State that grants them this shall add all proper restrictions. It is no more than is constantly done to the various pilot companies, steam navigation companies, whaling companies and others chartered by State legislatures." (22 N. J. L. 651-652.)

This case unhesitatingly affirms the doctrine here contended for that as incident to the power to create corporations is the power to prescribe the terms and conditions upon which they shall exist, and the principle is applied to a corporation chartered by a State to engage in the business of interstate commerce and the regulation is of rates of charges that might be made for interstate commerce business.

The case of Railroad Company vs. Maryland approaches the proposition more closely and with greater authority. The State of Maryland chartered the Baltimore & Ohio Railroad Company, and authorized it to construct its line from Baltimore to a point outside the State, viz., to Washington in the District of Columbia. Congress granted permission for the road to enter the District. The maximum charge for the carriage of passengers between Baltimore and Washington was fixed in the charter, and it was also therein provided that the company should semi-annually pay to the State one-fifth of the amount received for the transportation of passengers during the preceding six months. The company resisted payment of this charge upon the ground that the condition for payment provided for in the charter was invalid because violative of the Constitution of the United States, and that it was not estopped from setting up the defense. Justice Bradley, in delivering the opinion of the court, uses this language:

> "What amounts to a regulation of commerce between the States, or to a discrimination against

the citizens of other States? This is often difficult to determine. In view, however, of the very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises, and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts. It is not within the category of such acts. It may, incidentally, affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuitu*, and in the exercise of an undoubted power. The State is conceded to possess the power to tax its corporations, and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers. So the State has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro;* and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose. The stipulated payment in this case, indeed, is nothing more or less than a bonus; and so long as the rates of transportation are entirely discretionary with the States, such a stipulation is clearly within their reserve powers." (21 Wallace (88 U. S.) 473.)

The case of Covington Bridge Company vs. Commonwealth of Kentucky, may also be claimed as an authority upon the same subject, at least that part of the decision which states the ground of the concurrence of the Chief Justice and three associate justices in the opinion of the court. They say as follows:

"By the concurrent acts of the legislature of Kentucky in 1846, and of the legislature of the State of Ohio in 1849, this bridge company was made a cor-

> poration of each State, and authorized to fix rates of toll. Congress, by the act of February 17, 1865, c. 39, declared this bridge 'to be, when completed, in accordance with the laws of the States of Ohio and Kentucky, a lawful structure,' but made no provision as to tolls and thereby manifested the intention of Congress, that the rates of toll should be as established by the two States." (154 U. S. 223.)

This excerpt from the decision admirably illustrates the point that is here sought to be made, namely, that in the plenary power of a State or two or more States, by concurrent action to create interstate commerce corporations is included power to establish as a condition of incorporation the rates for the carriage of such commerce in such State or States, provided the intention of Congress not to interfere with the exercise of such power is made manifest.

It should be noted that the power to regulate rates is only claimed as incident to the granting of a charter or the passage of an incorporation act where acceptance by the corporation of the charter conditions is a prerequisite to incorporation. It should also be noted that no extra-territorial effect is sought to be given to the charter. The limitations are upon interstate commerce within the State granting the charter or the States concurring in its terms. And finally it is to be observed that the authority is to be exercised only on the express or implied consent of Congress.

With the limitations of the claim here made thus defined, the cases which have denied to the States authority to prescribe or regulate tariffs or fares for interstate commerce may be distinguished.

The case of the Wabash, St. Louis and Pacific Railway Company vs. Illinois, 118 U. S. 557, may be taken as representative. The court did not have under consideration in that case provisions of a charter or incorporation act to which the railroad company had given assent, but to regulations subsequently imposed by general law which were re-

sisted on the ground that the road's interstate commerce was not within the jurisdiction of State legislation. In the case we have in mind jurisdiction is predicated primarily upon the consent of the corporation to the State's action, and for that reason the Wabash case cannot be held to decide the point here made.

Justice Bradley, in the dissenting opinion filed in this case, to which the Chief Justice and Justice Gray gave assent, very forcibly states the distinction herein sought to be made. He says:

> "Now, since every railroad may be, and generally is, a medium of transportation for interstate commerce, and affects that commerce, and since the charges of fare and freight for such transportation affect and incidentally regulate that commerce; and since the railroad could not be built, and the charges upon it could not be exacted, without authority from the State,—it follows, as a necessary consequence, that the State, in the exercise of its undoubted functions and sovereignty, does, in the establishment and regulation of railroads, to a certain and a very material extent, not only do that which affects, but incidentally regulates, commerce. It does so by the very act of authorizing the construction of railroads, and the collection of fares and freights thereon. No one doubts its power to do this. The very being of the plaintiffs in error, the very existence of their railroad, the very power they exercise of charging fares and freights, are all derived from the State. And yet, according to the argument of the plaintiffs in error, pursued to its legitimate consequences, the act of the State in doing all this ought to be regarded as null and void because it operates as a regulation of commerce among the States. Not only does the right to charge fares and freights at all come to a railroad company from the grant of the State, but

the amount of such charges is also regulated by the State law, either by the charter of the company, or by legislative regulations, or by the general law that the charges shall be reasonable; and that is State law, and not United States law. Where else but from the laws of the State does the railroad company get its right to charge any fares or freight at all? And since its being, its franchises, its powers, its road, its right to charge, all come from the State, and are the creation of State law, how can it be contended that the State has no power of regulation over those charges, and over the conduct of the company in the transaction of its business, while acting within the State and using its railroad lying within the bounds of the State? *Omne majus continet in se minus.* If the State created the company and its franchises, it surely may make regulations as to the manner of using them.

It is evident from what has been said that the dealing of a State with a railroad corporation of its own creation, in authorizing the construction and maintenance of its road, and the charge of fares and freights thereon, is, in its purpose, a matter entirely aside from that kind of regulation of commerce which is obnoxious to the provisions of the constitution. There is not a particle of doubt that it was the right of the State to prescribe the route of the plaintiff's road,—it might be in a direction north and south, or east and west; it might be by one town, or by a different town. It was its right to prescribe how the road should be built; what means of locomotion should be used on it; how fast the trains might run; at what stations they should stop. It was its right to prescribe its charges, and to declare that they should be uniform, or, if not uniform, how otherwise. This certainly was the right of the State at the inception

of the charter, and every one of these things would most materially affect commerce, not only internal, but external; and yet not one of them would be repugnant to the power of congress to regulate commerce within the meaning of the Constitution.

Suppose the original charter of the railroad company in this case had contained precisely the provision against discriminating charges which is contained in the general law now complained of, could the company disregard the conditions of its charter, and defy the authority of the State? We think it clear that it could not." (118 U. S. 586-588.)

So far as we have been able to find, no case has approached nearer to the facts of the case at bar than the Wabash case, and hence it is needless to refer in detail to other cases of the class of which it stands representative. The case at bar presents the identical proposition which Justice Bradley cites in the last paragraph above quoted and the question here raised is whether the decision in the Wabash case rules the case which he cites by way of illustrative argument.

Since the Wabash case the Interstate Commerce law has been passed, and a necessary inquiry in this brief must be whether the terms of that act inhibits States by single or by concurrent acts from creating corporations to engage in interstate commerce or prescribing in their charters or incorporation acts the rates that may be charged therefor. It will hardly be contended that the right of States to organize commerce corporations is in anywise affected by this act of Congress. It may be doubted whether it remains longer in the power of a State by collusion with a corporation that it may organize to establish rates for interstate commerce that would be unreasonable or unjust as against the public. Congress has not itself sought to establish rates for this commerce nor has it granted authority to any body or board of its creation so to do. Its failure thus to do evidences an

intent not to interfere with any power previously exercised by the States. It only guards against extortionate charges in whatever form or by whatever authority imposed.

Taking up the Michigan statute under which the respondent company has been organized and the terms of which it agreed to conform to, it now objects to that provision which says that when the earnings of its passenger trains shall equal or exceed $2,000 per mile it shall reduce its passenger fares from three to two and one-half cents per mile. The act does not specify whether the reduction shall relate only to Michigan trips or is intended to include the Michigan portion of interstate trips. It does relate however, only to travel in Michigan and to charges to be made for travel in Michigan.

It will be conceded that in one case the Supreme Court of the State of Michigan in applying the provision to the Wabash Railroad which runs for a distance of ninety miles or thereabouts in Michigan, compelled the reduction only for trips originating and ending in the State.

Commissioner of Railroads vs. Wabash Railroad Company, 126 Mich. 113.

In that case, however, no claim was made that the Wabash Company had assented to the provisions of the act here in question by organizing thereunder at a time when the provision constituted a part of the act. The court therefore applied the act only to that class of fares over which the legislature of the State had jurisdiction irrespective of the element of consent.

The order which was made by the Circuit and Supreme Court in this case has followed the language of the statute, and by its terms applies to all passenger travel in Michigan. The claim is here made for the application of the order according to the assent of the respondent company. If that

assent cannot be held to relate to such portion of interstate travel upon respondent's road as is had in Michigan, it is conceded that the order should apply only to travel originating and ending in the State.

To an order in the latter form the only objection urged by respondent, outside of the possible unreasonableness of the rate imposed by the statute, is that the commerce clause of the Constitution is violated in the fact that the Michigan proportion of interstate fares is by the terms of and the practice under the act, included in the earnings per mile upon which the rate of fare is made to depend.

The same question was raised in the case of Commissioner of Railroads vs. Wabash Railroad Company, above referred to. No better answer can be made to the contention of the respondent than the language of the court in rendering its decision. It is as follows:

> "The question is, in determining what domestic fares shall be, is it competent to include the amount of interstate fares earned by that portion of the road lying within the State of Michigan? Without further discussion, we think this question must be answered in the affirmative. We think the case fairly within the principle laid down in Home Ins. Co. v. New York, 134 U. S. 594 (10 Sup. Ct. 593), and Maine v. Grand Trunk R. Co., 142 U. S. 217 (12 Sup. Ct. 121, 163). It is true that those were franchise taxes, imposed upon the right to do business in the State; but the principle enunciated is stated in the following language in Home Ins. Co. v. New York:
>
> 'The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows.'

So it seems fair and just that, in fixing the rate for domestic commerce, the earnings of the road in this State by its interstate commerce should be considered. We see no constitutional provision which is thereby violated. It is no interference with the rates which may be fixed by railroads on their interstate business." (126 Mich. 115.)

III.

A purchaser of a railroad on a mortgage foreclosure who incorporates under the general railroad law of Michigan must be held to have done so voluntarily, and a corporation thus created is bound to conform to the schedule of fares therein provided the same as a company incorporated thereunder to construct and operate a new road.

The argument of this brief has thus far proceeded upon the hypothesis that the case at bar is one of *voluntary* organization of a corporation in which the rights and burdens received and assumed and objected to are those expressed in the company's charter or incorporation law.

Appellant, however, claims that the fact that the organization in 1896 was a reincorporation, absolves it from the operation of the estoppel or waiver which would be implied in the case of an orginal organization. In other words we presume that the argument of the appellant will admit the fundamental proposition thus far advanced in this brief, but will deny its application to the case at bar, claiming a distinction between the waiver or estoppel arising from an original incorporation and that arising from a reincorporation.

To state respondent's proposition in the most direct form possible, it seems to be this, viz:

The original Grand Rapids and Indiana Rail*road* Company had the right under repeated adjudications of the

United States Supreme Court to object to the operation of the amendment of 1889 to the general railway law providing for a graduated reduction of passenger fares, if such operation deprived it of reasonable earnings. This right the appellant claims was a franchise right *inherent in the property* of the Grand Rapids & Indiana Rail*road* Company. The transfer of this property through mortgage foreclosure and sale and subsequent reorganization did not divest this property of this *inherent franchise right*, and hence the Grand Rapids & Indiana Railway Company by successorship of this franchise has not waived and cannot be held as having waived or as being estopped from invoking the protection of the Constitution of the United States against the operation of this amendment of 1889.

In view of the contention it seems advisable to direct the attention of the Court to a consideration of just what rights and franchises were vested in the appellant corporation by way of successorship when it was organized in 1896.

It is true that the Michigan statute provides that a railway comapny organized by a purchaser upon foreclosure sale under the provisions of the section of the general railway law quoted in the statement of facts, "*shall have the same rights, powers and privileges as are or may be secured to the original company.*" (See paragraph 4, statement of facts.)

It is also provided in the general railway law of Michigan that railway companies might be authorized "*to mortgage* their corporate property and *franchises.*"

The record in this case shows that the mortgage foreclosed did include in apt language "The franchises of the Grand Rapids & Indiana Railroad Company," and that these franchises were sold.

The question is whether "this right to contest the validity of the section fixing rates and charges as requiring the carrying of passengers at unreasonable rates," was a *franchise* of the original company or a *power* or *privilege* that under the law was transferred to the succeeding company.

Upon the question appellee advances the following:

1. The appellant can hardly make the claim that the franchise referred to as subject to the mortgage and which might be vested in a corporate successor included, "perogative" franchises, or the right to be and exist as a corporation. That such is not the intendment of the law is apparent from its terms.

Section 2 of Article I previously referred to in this brief, provides that in case of foreclosure under any mortgage, the purchaser may be permitted to organize a corporation for the management of the same. If the right to be a corporation or to acquire the life and being of, or authority to continue and control the operations of the corporation whose property was sold were franchises or rights that were carried to the purchaser on mortgage foreclosure sale, there would be no necessity in this act for the provision allowing to the purchaser the opportunity to change his individual or private ownership of the property to a corporate ownership.

That the right to be a corporation or the corporate organization and the power to control it, is not strictly speaking a corporate franchise is expressly ruled by various decisions.

Mr. Justice Manning, in a case before the Supreme Court of Alabama, Meyer v. Johnston, 53 Ala. 237, 325, uses the following language:

> "Strictly, 'the franchise to exist as a corporation' is not a corporate franchise, or 'franchise of the corporation,' at all. It is a franchise of the individual corporators, of the natural persons who are shareholders of the capital stock, and pertains to them as such corpo[illegible] whereby they are endowed with the privilege and capacity of being constituted into, and co-operating together as, a body politic, with power of succession, and without individual liability. And the corporation as such, in its collective capacity or by its board of directors has no more power to sell this franchise thus pertaining to the corporators individually than it has to sell their paid up shares of

the capital stock. The interest of each of these in this franchise is transferred with his shares of stock, and passes with them from one individual to another; and this is the proper mode of parting with and acquiring this particular privilege. A railroad company may continue to exist as a corporation after its railroad, with all of its appurtenances, has been sold away from it. There may be other property to dispose of, or credits to get in, or obligations to be discharged, or interests to be protected, which require its continued existence, and which may not belong to, or be chargeable upon, the persons who were purchasers of its railroad and the franchises necessary for the maintenance and operation of it. And on the other hand, those purchasers might not desire to be constituted into a corporation at all. Or, if they did, it might be very inconvenient to find themselves composing the same body politic whose property had just been sold to them for the payment of some of its debts. For it would seem that if with the railroad they acquired also the company's 'franchise to be a corporation,' with the same faculties and name, by virtue of and with which the former body existed, they acquired it to be assumed and used, and so must themselves become that corporation, and be bound to perform its obligations." (53 Ala. 325.)

In the case of Eldridge vs. Smith, 34 Vt. 484, 489, Chief Justice Poland makes the following statement in the decision of the case:

"It is said that one of the franchises of all corporations is the power of being a body politic, corporate existence, with rights of succession of members. Another is, its rights of representation in court by its corporate name, either as plaintiff or defendant. It has a general power, also, of acquiring, holding,

and conveying property. In addition to these general corporate powers, this company was invested by the legislature with a power to build a railroad between certain points, and to operate and manage the same, and take tolls and fares on the same for their own benefit and profit; and, to the extent of the proper necessities of the road, were authorized to exercise the sovereign power of the State, to sequester private property without the consent of the owners, by making compensation therefor. When a railroad company mortgages its road and appurtenances as a security for debt, and also its franchises, it is not to be understood as conveying its corporate existence, or its general corporate powers, but only the franchise necessary to make the conveyance productive and beneficial to the grantees, to maintain and support, manage and operate, the railroad, receive the tolls and profits thereof for their own benefit." (34 Vt. 489.)

2. It is apparent from the terms of the Michigan law that it was not intended that the reorganized company should have any franchise rights or powers or privileges which did not have their source in, or which were not held pursuant to the act under which the reorganizing company was incorporated.

The effect of the language of section 2 above quoted, viz: that the reorganization company, "shall have the same rights, powers and privileges as are or may be secured to the original company," is to vest in the succeeding corporation the property or contract rights, or choses in action of the preceding corporation, *with such powers of the old corporation as are conceded by the general railway law of the State under which the new company is organized.* The law as existant when the new company is organized is to be the measure of its corporate capacity. This is clearly indicated by the latter

part of section 2, which limits and restricts the language of the earlier part of the section previously quoted. That language is, that after the articles required by the section are filed and recorded, *"the said corporation shall become complete, with all the powers and rights secured to railroad companies, under this act, to all the provisions of which, and amendments thereto it shall be subject."* (Act 198, 1873.)

If on foreclosure sale, the property of the old company was purchased and thereafter held and operated by an individual, a trustee or an unincorporated association of individuals, there is no doubt but that he or they would succeed to such powers of the old corporation mortgaged as franchises, as would be necessary to utilize and operate the property. This proposition is treated later in this brief. But if he or they should subsequently incorporate under the general railroad law of the State, while the powers and the rights acquired under the incorporation might be identical in terms with those enjoyed by successorship from the old railway company under whose mortgage they have acquired title to the property, yet they would be new powers and obligations in the same sense that the right of a tenant who had obtained a new lease of premises held in occupancy, would trace their origin not to the old but to the new lease under which the holding is now had. While the two leases might be identical, the rights under the new lease could be due in no sense to the successorship of rights from the old, but authority would be found solely in the new grant.

3. The right to invoke the protection of the 14th amendment of the Constitution of the United States is not a franchise or right originating in laws permitting incorporation, and hence cannot be claimed to have been assigned or transferred by the operation of such laws.

The right to invoke the protection of this great charter is personal to each and every individual resident in the United States, and its operation has been held to apply in certain respects to corporations. By the very nature of the right it

is not subject to assignment. My rights to the equal protection of the laws would be no greater because some one else had been pleased to assign to me his rights. Nor would the assignment to me of the rights of another, if such could be done, save me from the operation of a waiver of those rights if my actions indicate such to have been my intent.

Certainly the appellant cannot with good face contend that the general railway law of Michigan conceded as a franchise to incorporators thereunder the right to contest its constitutionality. The claim that the right of the original corporation to raise the question of the reasonableness of the rates, necessitates the assumption that the legislature, in enacting section 2 above quoted, had in mind that unreasonable rates might be imposed, and therefore, gave to succeeding corporations the same power of raising the unreasonableness of these rates as its predecessor possessed. The assumption, in our judgment, is absurd. And yet the right claimed by appellant, must find its basis in this very assumption, when it claims the right to invoke the protection of the 14th amendment through successorship from the Grand Rapids & Indiana Railroad Company by the terms of the general railroad law of Michigan now under discussion.

If the right to raise the question of reasonableness of the rates fixed by the amendment of 1889 was a privilege personal to the original corporation it would seem as if the numerous authorities of this Court to the effect that exemptions and immunities from taxation deemed as personal to the corporation receiving the grant will not be held as having been transferred to another company by general language. The case of Chesapeake & Ohio Ry. Co. vs. Miller, 114 U. S. 181 is fairly illustrative of the application of the principle. In that case the plaintiff company had succeeded to the rights and privileges of a prior corporation under an act which provided, "The corporation created by or in consequence of such sale and conveyance *shall succeed to all such franchises, rights and privileges, and perform all such duties as would have been had or should have been performed by the first*

company but for such sale and conveyance." It was there held that only those positive rights and privileges, without the possession of which the road of the company could not be successfully worked, were transferred, and that immunity from taxation, being a privilege personal to the original corporation, could not be succeeded to and possessed by the purchasing corporation in the absence of an express statutory direction to that effect.

See also Wilson vs. Gaines, 103 U. S. 417.

4. The purchaser on the foreclosure sale had ample powers to continue the operation of the property purchased under the franchise of the original company, and his incorporation under the general railway law of Michigan was a voluntary acceptance of the privileges of that act.

In the decision of the case at bar in the Supreme Court of Michigan, Justice Montgomery states the following:

> "May it not be said that the rights and property of this corporation vested in the purchaser upon the foreclosure sale, and that, independent of any express statutory authority to operate, the purchaser was authorized to maintain his property rights, and to operate this railroad in accordance with the franchise of the original company, and under precisely the same conditions?"
>
> See opinion in printed record, page 64.

While private ownership of railroads is not common, and while it may not have been the policy of the State to grant to individuals the powers which are ordinarily necessary for the construction, maintenance and operation of railroads, yet it is obvious that to inhibit individuals from bidding upon

railroad properties or from actually purchasing the same at foreclosure sale would operate as a serious and perhaps unpermissible abridgement of property rights. If under the laws and policy of the State of Michigan it is permissible, and we may certainly assume that it is so held by the highest court of the State of Michigan, as witness the excerpt from Justice Montgomery's opinion in this case,—for an individual, by purchase of the franchises of a railroad company in connection with its property, to thereafter operate the road in accordance with such franchise and under precisely the same conditions as if these franchises appertained to him as an individual instead of appertaining as previously to a corporation, wherein could he be said to suffer in his property rights if authority to incorporate was withheld from him. Or, on the other hand, if the privilege of incorporation upon terms was offered,—not forced upon him,—would he not have the opportunity to measure the advantages and disadvantages of the proffered organization with the privileges and burdens of the condition under the law in which he had voluntarily placed himself by the purchase of the property and franchises of an existing railroad? The opportunity of choice exists to the same extent and in the same manner as it would exist to individuals who should embark upon an entirely new railroad enterprise. The terms of incorporation are known. Those who would incorporate are free to accept or refuse. If they accept, the assumption of the burdens of the law is by their voluntary act and must be held forever after as a waiver of a right to complain against its terms.

5. A case that seems to be almost identical with the case at bar lately came before the Supreme Court of Mississippi.

> Alabama & Vicksburg Ry. Co. v. Odeneal, 73 Miss. 34, 39.

The Alabama & Vicksburg Ry. Company became the purchaser of the Vicksburg & Meridian Railroad Company under foreclosure sale ordered by a Federal court in 1889, and reorganized under the provisions of the act of the legislature of Mississippi, approved March 9, 1882 (Laws Miss. 1882, p. 47). An act of March 13, 1884, relative to farm crossings was then in force and had become an integral part of the law under which the reorganization was effected. Odeneal brought an action against the railroad company for the recovery of a penalty provided by the act, last mentioned, for failure to provide a suitable crossing over its tracks for a necessary plantation road to connect plaintiff's plantation. The railroad company contested the suit on the ground that its right of way antedated the act of March 13, 1884, and its road was constructed long before such legislation was contemplated and that it was unconstitutional to restrict its rights by such additional burden.

The Court, however, says:

> "The act of March 13, 1884, relative to farm crossings was then (at the time of reorganization) in force, and was therefore integrated into its charter upon organization and under said laws as a part thereof, *and appellant has, therefore, no standing to question the constitutionality of the legislative provisions touching such crossings.*" (73 Miss. 39.)

The above case would seem to lack nothing as authority upon the case here under consideration. The very fact upon which appellant most relies, viz.: that its incorporation was by way of reorganization and not original incorporation was a feature of the case cited, and all of the arguments that are advanced by appellant in this case might have been advanced in that case with equal pertinacity.

In the light of this analysis and particularly in view of the decision of the Supreme Court of Michigan upon the rights and authorities of an individual purchaser at mortgage

foreclosure sale of the property and franchises of a railroad company that had, under express statutory authority, mortgaged its franchises in connection with its property, it is difficult to see the force of appellant's argument that it is not bound to the terms of the act under which it was incorporated in exactly the same manner as if the incorporation was for the purpose of constructing a new road.

IV.

The judgement of the supreme court of Michigan in the case at bar was not based upon any federal question and this court is without jurisdiction to review it.

On the application of appellant to a member of this court for the granting of a writ of error a brief was presented urging the above proposition, and the appellee re-urges the same in this brief.

The case of Electric Company vs. Dow, 166 U. S. 489, and cases there cited would seem to be in point. The case has been previously referred to in this brief and its points of contention stated. Justice Shiras in winding up the opinion of the Court says:

> "The plaintiff in error accepted the powers and rights conferred by the act of 1868, and joined in the proceedings for the assessment of damages. It must therefore be deemed to have agreed that the damages should be assessed in the manner provided for in the act. *At all events the Supreme Court of the State has so decided, and as its judgment was not based on any Federal question we have no jurisdiction to review it.*" (166 U. S. 492.)

The cases cited in this opinion are as follows:

Clay vs. Smith, 3 Peters 411.
Beaupré vs. Noyes, 138 U. S. 397;
Eustis vs. Bolles, 150 U. S. 361.

In the case at bar, the answer of appellant admitted its incorporation in 1896, when the provision regarding the graduation and reduction of passenger fares was a part of the general railway law of the State. The demurrer of appellee raised the question of whether by its acceptance of the powers and rights conferred by the law through incorporation thereunder it must not be held to have agreed that its passenger charges should be according to the provisions of that act. The Michigan Supreme Court so decided. The view taken by the latter Court did not involve a Federal question. It is broad enough in itself to support the final judgment without reference to the Federal question sought to be raised by appellant.

It is submitted that without regard to the other consideration presented in this brief, that this point should cause the dismissal of the writ.

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HORACE M. OREN,
Of Counsel.

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FILE COPY.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 61.

Office Supreme Court U.S.
FILED
NOV 6 1903
JAMES H. McKENNEY,
Clerk.

THE GRAND RAPIDS & INDIANA RAILWAY COMPANY,
Plaintiff in Error,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS OF THE STATE OF MICHIGAN,
Defendant in Error.

ADDITIONAL BRIEF ON BEHALF OF DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

CHARLES A. BLAIR.
Attorney General of Michigan,

Of Counsel.

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ADDITIONAL BRIEF ON BEHALF OF DEFENDANT IN ERROR.

General Statement of Issues Presented.

The sole questions presented in this case are those raised by the demurrer to the respondent's answer, and those incidentally determined by the State Supreme Court, in sustaining the demurrer.

The demurrer filed, as amended pursuant to the order of the State Court (Record, p. 65) sets forth two grounds of demurrer, as follows:

> "*1.* That upon its incorporation in 1896 under the general railroad law, the said respondent entered into and became a party to a contract with the State of Michigan, one of the conditions of which was and is the agreement on the part of said respondent to carry all passengers at the rates fixed by subdivision ninth, section nine of article two of said general railroad law, under which it is incorporated.
>
> "*2.* That upon its incorporation in 1896 under the general railroad law, the said respondent became subject to that law and the provision therein requiring it to carry passengers at the rates fixed in subdivision ninth, section nine of article two of that law, said provision in regard to rates being one of the conditions of the existence of respondent." (57.)

If the decision of the State Court is affirmed and the demurrer sustained, the respondent and plaintiff in error is required to carry at the statutory rate, which is being complied with by numerous other railroad companies, existing and doing business under conditions no more favorable than is the respondent.

If, on the contrary, the decision of the State Court and the demurrer are overruled, the case must be remanded for a determination as to the reasonableness of the rate fixed, unless it be determined that the statute as construed by the State Court is invalid, in including in the basis for the determination of the rate a portion of the interstate fares, or in not providing for a judicial determination of the reasonableness of the rate fixed, or is invalid as being a conclusive and final determination of a reasonable maximum rate.

POINTS.

I.

The state decision and its effect.

The State Court, in its opinion sustaining the demurrer in this case, passes upon and settles the Michigan law in the following particulars:

(*a*) That the respondent and plaintiff in error, by incorporating under the general railroad law, became and is subject thereto, and will not be heard to question the rates fixed by the statute. (Record, p. 63.)

(*b*) That the organization of the respondent and plaintiff in error under the general railroad law, so-called, of the State of Michigan, after acquiring by foreclosure, the rights and property of a previously existing railroad corporation, was made subject to all the provisions of the statute of incorporation, as previously amended, and as it at that time existed.

(*c*) That the same right to question the reasonableness of the rates fixed in the statute of incorporation which was possessed by its predecessor was not, by the terms of the statute, transferred to and did not become one of the rights of the respondent and plaintiff in error.

(*d*) That the provision of the general railroad law (§ 2, Art. 1, Act 198, 1873,—6225, C. L. 1897), giving to purchasers upon foreclosure the right to organize a corporation, was a matter of general law, and did not, upon the issuance of bonds, become a part of the contract with the bondholders.

(*e*) That the purchaser upon foreclosure could maintain his property rights and operate the railroad in this State, in accordance with the franchise of, and under precisely the same conditions as, the original company, without becoming a corporation.

The State Supreme Court, in reaching these conclusions, passed upon, not Federal questions, nor questions of a gen-

eral commercial character, but upon questions of purely local Michigan law, involving the construction of the State statute and the application of the principles of the Michigan common law. The decision of a State Court, upon questions of this character, has always been regarded by this court as conclusive and binding upon it.

Luther v. Borden, 7 How. 40;
Bucher v. Cheshire R. Co., 125 U. S. 555;
Pittsburg, etc., R. Co. v. Backus, 154 U. S. 421;
McElvaine v. Brush, 142 U. S. 155;
Miller's Exrs. v. Swann, 150 U. S. 132.

In cases of this character, this court determines, not what the Michigan law is, or what effect is to be given to it, but as to whether it, as construed, applied and given effect by the State Court, violates any of the principles of the Federal constitution.

Northern Central Railway Company v. Maryland, 187 U. S. 258, 261.

II.

Effect of incorporation of respondent.

A corporation is subect to, and cannot question the validity of, the statute under which it has voluntarily incorporated. This rule has been repeatedly stated and applied by this court.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 512, 513, (161 U. S. 703);
Reagan v. Farmers' Loan and Trust Company, 154 U. S. 362, 409, 411;
Ashley v. Ryan, 153 U. S. 436, 443.

In *Louisville & N. R. Co.* v. *Kentucky*, the constitution of the State of Kentucky contained a provision prohibiting companies from charging more for a shorter than for a longer haul, with certain exceptions. The railroad company, being subsequently incorporated, objected to this provision, as depriving it of constitutional rights. The court held the railroad company, by its incorporation, to have accepted the constitutional provision and to be subject thereto, without authority to question its validity, saying:

> "It does not call for argument that railroad companies are incorporated to perform a public service, and that it is for the State to define their powers and to control their exercise of such powers. The question for us, in the present case, is whether the State, by enacting a rule of action for such companies, forbidding a greater rate of charges for a shorter than for a longer distance, and by establishing a railroad commission of the kind and with the functions disclosed in the Constitution and statutes, deprives the plaintiff in error of its property without due process of law, and denies to it the equal protection of the laws.
>
> "When the citizens of Kentucky voluntarily seek and obtain a grant from the State of a charter to build and maintain a public highway in the form of a railroad, it would seem to be evident that it takes, holds and operates its road subject to the constitutional inhibition we are considering, and are without power to to challenge its validity. It may be that in a given case a railroad company may be able to show that the State has disabled itself from enforcing the provision by a contract previously made, and it may be that cases may arise in which the provision cannot be enforced because operating as an unlawful interference with commerce between the States. Indeed, those very positions are taken by the plaintiff in error in this

case, and will receive our attention hereafter. But apart from such contentions, and looking only at the case of a company voluntarily formed to carry on business wholly within a State, we are unable to see how such company can successfully contend that it can be exempted by the courts from the operation of the Constitution of the State. * * * As already said, the railroad company must be deemed to have accepted its grant, subject to the provisions of the Constitution, and this presumption is as applicable to the method provided for exoneration from the prohibition as to the prohibition itself.

"We do not put the disability of the company to raise these questions upon the ground of an estoppel, strictly speaking, but upon the proposition that the company takes and holds its franchises and property subject to the conditions and limitations imposed by the State in its Constitution. Munn v. Illinois, 94 U. S. 113; Davidson v. New Orleans, 93 U. S. 97; Railroad Commission Cases, 116 U. S. 307." (183 U. S. 512-513, 516.)

III.

The action of the State does not impair the obligation of contract.

If any Federal question is raised by the demurrer upon this record, it is that the State has disturbed contract rights by refusing the purchasers upon foreclosure the right to organize a corporation, under the law as it existed at the time the foreclosed mortgage of 1884 was given and bonds issued, without the addition of new conditions. If this Federal question is raised, it is without merit, being expressly covered by the decisions of this court.

The decision of the Supreme Court fixes the status of the

statute permitting the respondent, and plaintiff in error, to incorporate as the purchaser upon foreclosure of the mortgages given by its predecessor, and determines its right thereunder. Did the statute existing at the time that the mortgages were given (1884) constitute a part of a contract between the State and the bondholders or purchasers upon foreclosure to the effect that the bondholders or purchasers should have the right to reincorporate under the statute in practically the same terms as it existed at the time the mortgage was given, and did the change in the statute, by reducing the rate of fare allowed to be charged to such an extent as to be insufficient to pay a return upon the investment, operate to impair the conditions of that contract and to deprive the bondholders of their property without due process of law. There is considerable force in the contention of respondent, if, as a matter of law, it was guaranteed the right to incorporate under as favorable conditions as existed at the time the mortgages were given; but the right of the purchaser upon foreclosure to reincorporate was a matter of statute—a matter of general law, within the authority of the legislature to alter or change at any time, and which did not enter into and become a part of the contract between the mortgagor and the bondholders, or between the State and the mortgagor and bondholders. This point is clearly illustrated in the cases of *Schurz v. Cook,* (148 U. S. 397), and *Memphis & Little Rock R. R. Co. v. Commissioners,* (112 U. S. 609). In *Schurz v. Cook,* a certain railroad company executed a mortgage upon its property and franchises to secure the payment of bonds issued by it, at which time there existed a statute permitting the purchasers upon foreclosure of railroad property and franchises, to become a body politic and corporate, and as such, to take, hold and possess the title and property included in said sale and all the franchise right, powers, privileges and immunities which were possessed before such sale by the corporation whose property was sold. Default was made in the payment of the bonds, and foreclosure had; the purchasers presented to the Secretary of State, for filing, the

certificate required by the statute. The Secretary of State refused to receive the same without the payment of a franchise fee, under a statute enacted since the giving of the mortgage. The purchasers insisted upon the right to reorganize under the statute as it existed at the time the mortgages were given, without the imposition of new conditions, and that that statute constituted a contract between the bondholders and the State. The court, in disposing of the question, says that in many, if not most, acts of incorporation there are various provisions which are matters of general law and not of contract, and that such is the character of the right in mortgage bondholders or purchasers at a sale under the mortgage to organize as a corporation, after acquiring the title to the mortgaged property, and the statute should be construed as conferring only a right to organize as a corporation according to such laws as might be in force at the time when the actual organization takes place, saying:

> "It cannot, we think, be admitted that a statutory provision for becoming a corporation *in futuro* can become a contract, in that sense of the clause of the Constitution of the United States which prohibits State legislation impairing its obligation, until it has become vested as a right by an actual organization under it; and then it takes effect, as of that date and subject to such laws as may then be in force. * * * They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment." P. 619. "All the franchises necesasry or important to the beneficial use of the railroad could as well be exercised by natural persons. But it is urged by plaintiffs in error that, under the decisions of the highest court of New York, they cannot, as private persons or as an association, so use, maintain and operate the railroad which

they have purchased. Without reviewing the New York cases cited in support of this position, we doubt whether they go to that extent. But if they so held under any law of the State passed since the execution of the mortgages under which plaintiffs in error have succeeded to the properties and franchises of the railroad sold under foreclosure, as already mentioned, *then* the question would be whether the impairment of the obligation of the contract would not consist in *denying* the purchasers the right to use the property and franchises so acquired. The fact, if it exists, that plaintiffs in error are not allowed to operate the railroad and exercise the franchises purchased without first obtaining corporate existence, in no way shows or tends to establish their contention, that said act of 1874, as amended in 1876, constituted a contract on the part of the State to confer corporate capacity upon them without imposing any tax as a prerequisite to the grant of corporate existence. * * * There is no provision of the law under which they made their purchase requiring them to become incorporated, but, desiring corporate capacity, they demanded the grant of a new charter under which to exercise the franchises so acquired, without compliance with the law of the State existing at the time their application for incorporation was made. We are clearly of the opinion that the act of 1874, as amended in 1876, set up and relied upon by them, does not sustain such a claim. The provisions of that act do not constitute a contract on the part of the State with either the corporations, or the mortgagees, bondholders or purchasers at foreclosure sale. They are merely matters of law instead of contract, and the right therein conferred upon purchasers of the corporate properties and franchises sold under foreclosure of mortgages thereon to reorganize and become a *new corporation*, is subject to the laws of the State existing or in force at the time of such

reorganization and the grant of a new charter of incorporation." (408, 409, 410.)

If the points raised in the demurrer are well taken, this disposes of the case, and those points must be held to be well taken and the decision of the State Supreme Court in regard thereto final, unless the State was without the right to attach conditions to the right of the purchasers on foreclosure to reorganize, after the giving of the mortgage.

If the demurrer be overruled, the questions of whether the act violates the interstate commerce clause of the Federal constitution, or, by reason of being held by the State Court, in the case of Wellman v. Chicago & Grand Trunk R. Co., 83 Mich. 592, to be a final and conclusive declaration of a reasonable maximum rate, without judicial authority to interfere, or by reason of making no provision for a judicial determination of the question of reasonableness, deprives respondent of its property rights, become material, and those questions will be briefly discussed.

IV.

Interstate Commerce is not, directly or indirectly, interfered with.

The statute, in its operation, is limited to commerce between points entirely within the State. It has been so limited by the State Court, (Commissioner of Railroads v. Wabash Railroad Company, 126 Mich. 115), and this court will follow that construction and so limit it to give it a constitutional operation.

It may be said, however, that the rate for the local fare is fixed by a reference to the interstate fare, including such a portion of the interstate fare as the distance carried in Michigan bears to the entire distance carried. This does not affect, either directly or indirectly, the interstate fare. The

railroad company charges such interstate fare as it sees fit, subject to the limitations prescribed by Congress and the Interstate Commerce Commission; but when the intra-state fares and the proportion of the interstate fares earned in Michigan reach the amount fixed by the statute,—in this case, two thousand dollars per mile,—the railroad company is required to carry at a fixed rate,—in this case, two and one-half cents per mile. The interstate rate is referred to and included, not for the purpose of affecting it, but solely and exclusively as a basis of classification, and nothing more. The rule results, from the decisions of this court in *Home Life Insurance Co. v. New York* (134 U. S. 594), and *Maine v. Grand Trunk Railroad Company* (142 U. S. 217), that the mode of measurement to be prescribed by a legislative body, when legislating with regard to matters within its jurisdiction, in fixing the amount of a tax, or in fixing a maximum rate of charge, is not open to constitutional objection.

It will be noted that, in this case

(*a*) A reference to the interstate receipts is not for the purpose of affecting any rate, either interstate or local, but is for the purpose of fixing a classification, and when this classification is fixed, a certain, prescribed statutory rate becomes applicable; and

(*b*) The classification is made, not upon future receipts or with the purpose or intent of affecting future receipts or interstate fares, but upon past business and receipts, and with the purpose of affecting, in the future, only the intra-state or local fares.

In these particulars, the case is distinguished from that of *Louisville & N. R. Co. v. Eubank* (184 U. S. 27), where the statute of the State of Kentucky, in so far as it prohibited a greater charge for a short haul entirely within the State of Kentucky, than for a longer haul in the State of Kentucky and another State or States, was declared unconstitutional. In that case, while it was held that the State had no right to fix its local rate with reference to an existing interstate rate

fixed by the carrier itself, it was said that it might fix the local rate by a reference to the interstate rates prescribed by Congress or the Interstate Commerce Commission, and "enact that the road should not charge more nor at a greater rate for a short haul within the State than Congress provided for the long interstate haul. The reason is that Congress in the case presented is assumed to have the power to direct and regulate the interstate rate, and having that power and exercising it the State could then provide that its internal charge should not exceed that rate, and there would be in that case no interference with or regulation of interstate commerce directly or indirectly by the State, its action could have no possible effect upon the interstate rate, as the amount of the charge would be regulated by the body with which the right of regulation exists." (41.)

In this case, the classification is made and the rate fixed simply by reference to a past transaction, and the fixing of the local rate can have no influence upon, or affect, future interstate transportation.

V.

The statute, fixing the maximum rate of charge is not unconstitutional because declared by the State Supreme Court to be conclusive upon the courts and to allow no judicial investigation as to the reasonableness of the rates fixed.

(*a*) Was the question of whether this statute was or was not conclusive, before the Supreme Court in the case of *Wellman v. Chicago & Grand Trunk R. Co.* (83 Mich. 592)? If that question was not involved in the case, it forms no part of the decision, though the court, in passing, may have adverted to, and seemed to decide, it. The question involved in that case was whether the circuit judge erred in refusing to instruct the jury that the act was unconstitutional. That

was the only question in the case, as is indicated in the opinion of the Supreme Court of the United States in *Chicago & Grand Trunk Ry. Co. v. Wellman,* where, upon the same record as presented to the State Court, it was said: "The single question presented on the record is, whether the trial court, on the facts presented, erred in refusing to instruct, as a matter of law, that the act of 1889 was unconstitutional." (143 U. S. 339, 342.)

(*b*) Assuming that the question claimed to have been decided in *Wellman v. Chicago & Grand Trunk Ry. Co.* was involved in the case, and that the court did there decide that the courts had no authority to inquire into the reasonableness of the rates fixed, it does not follow that the case presented is identical to that presented to the Supreme Court in the case of *Chicago, etc., R. Co. v. Minnesota* (134 U. S. 418). The case presented to the Federal Supreme Court there, and the case of *Wellman v. Chicago & Grand Trunk Ry. Co.,* are very clearly distinguishable. In the case presented in *Chicago, etc., R. Co. v. Minnesota,* the Supreme Court of the State of Minnesota held that the legislature intended that the act should be final and conclusive as to the reasonableness of the rates prescribed, and that the act was final and conclusive. The question decided by the Supreme Court of Minnesota was the construction to be placed upon its own statute, upon which the judgment of the State Court is always final and not reviewable by the Federal Courts. The construction placed upon its act by the Supreme Court of the State of Minnesota was such as gave it an unconstitutional operation; and as the Federal Courts were obliged to follow the State Court in that construction, it was absolutely necessary that either the statute, or the action of the State Court, should be declared unconstitutional.

In the *Wellman* case, although both a constitutional provision and a statute were under discussion, the question decided was not purely one of statutory construction, but was the enunciation of general principles based upon the State

Court's understanding of the reasoning in the Federal cases of *Munn v. Illinois; Chicago, etc., R. Co. v. Minnesota,* and others. That being the case, the decision of the State Court would not be regarded as final and unreviewable, either in that court or in the Federal Court; and instead of saying that the statute was invalid because given a conclusive effect by the State Court, the Federal Court would investigate for itself to determine whether or not it was within the authority of the courts to make inquiry as to the reasonableness of the rates established.

Venice v. Murdock, 92 U. S. 494;
Genoa v. Woodruff, Id. 502;
Michigan Central R. Co. v. Myrick, 107 U. S. 102;
Clark v. Bever, 139 U. S. 96;
Norton v. Shelby County, 118 U. S. 425.

In *Clark v. Bever,* the Federal Supreme Court, in deciding that certain decisions of a State Court were reviewable, said: "The decisions of the State Court are not, therefore, to be regarded as resting upon the local statute, but only as expressing the views of that tribunal in respect to the same principles of general law announced by this court, after the fullest consideration, in the numerous cases to which we have adverted. * * * We cannot, consistently with our deliberate judgment upon this question of general law, accept the decision in Jackson v. Traer as controlling the determination of the present case." (139 U. S. 116, 117.)

This decision has been recognized by the Federal Supreme Court in passing upon the very questions which we are now discussing. In *Chicago, etc., R. Co. v. Minnesota* (134 U. S. 418) it refused to interfere with the construction by a State of its own statute. In *Chicago & Grand Trunk Ry Co. v. Wellman* (143 U. S. 339), it did review the question passed upon by the State Court. Had it regarded the case of *Chicago, etc., R. Co. v. Minnesota* as furnishing the criterion for the determination of the question here presented, it would

have had no other alternative in the case *Chicago & Grand Trunk v. Wellman* presented to it than to have declared the Michigan statute unconstitutional. But it did not do so. On the contrary, it held that the presumption was in favor of the constitutionality of the act, and overruled the decision of the State Court (114 Mich. 476), saying: "The extent of judicial interference is protection against unreasonable rates," (344), and holding also that the circuit judge did not err in refusing to instruct that the act was unconstitutional.

Cases which are identical in effect with this case, are those of *Reagan v. Farmers' Loan & Trust Co.* (154 U. S. 397), and *Southern Pacific R. Co. v. Board of Railway Commissioners* (78 Fed. 236). In both of these cases the statute contained a provision that the rates fixed by the commission should be final and conclusive. This court, in the one case, and Judge McKenna, in the other, held that this statutory provision was void, and did not affect the validity of the remainder of the act. In this case, instead of the provision, in regard to the rates being conclusive, being enacted by the legislature, it is incorporated by the courts by reason of a misapprehension of certain Federal cases. The authority exists in the Federal Courts in either case to declare the provision unconstitutional, and thus give the statute a constitutional operation. The analogy of these cases to the case at bar is evident.

(*c*) Though the decision of the State Supreme Court gives the State statute an unconstitutional operation, the questions presented in that decision are subject to a reconsideration, and when the decision is altered so far as is necessary to effect a constitutional operation, the statute will be valid. In other words, it may be regarded as the action of the courts in preventing or refusing an investigation as to the reasonableness of the rates fixed and not the statute fixing the rates, which is unconstitutional. This view was evidently taken in the cases of *Chicago, etc., R. Co. v. Minnesota* (134 U. S. 418), and *Covington, etc., Turnpike Co. v. Sanford* (164 U. S.

578). In the former of those cases it was said: "This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. (456, 457.) * * * The issuing of the peremptory writ of mandamus in this case was, therefore, unlawful, because in violation of the Constitution of the United States; and it is necessary that the relief administered in favor of the plaintiff in error should be a reversal of the judgment of the Supreme Court awarding that writ, and an instruction for further proceedings by it not inconsistent with the opinion of this court. In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a mandamus, if the court should adhere to its opinion that, under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission. Still, the question will be open for review." (134 U. S. 458, 459.) By this language the court intended that the Supreme Court of Minnesota might alter its decision, investigate the reasonableness of the rates prescribed by its statute, and by so giving it a constitutional operation, render it a valid statute. That this was so, is evidenced by the view which is taken by Judge McKenna in his opinion in *Southern Pacific R. Co. v. Board of Railway Commissioners* (78 Fed. 259), where, after quoting the above language of Justice Blatchford, he said: "The question could not be open for review if there was an antecedent defect in the creation of the commission which rendered any exertion of duties invalid, because the statute creating it had not provided for notice to the railroads affected by such exertion of duties."

VI.

The statute is not void by reason of not providing for a judicial investigation as to the reasonableness of the rates fixed.

The power is inherent in the judiciary to inquire into the reasonableness of rates of charge fixed by the legislature, and it is not necessary that that power be conferred and the machinery therefor provided by statutory enactment. Without statutory authority, the courts have power to inquire into the constitutionality of enactments of the legislature. The enactment of the legislature in regard to rates depends, ordinarily, for its validity, upon the reasonableness of the rate fixed, and it is not within the authority of that body to oust the judiciary from jurisdiction over the question by a neglect to provide that an inquiry be made.

The courts have universally conducted inquiries into the reasonableness of maximum rates of charge permitted to public service corporations, and have given relief against unreasonable rates, regardless of the fact that the legislature omitted to make provision for inquiry into the reasonableness of the rate fixed, and the authority to do so is regarded as a judicial function. The inquiry into the reasonableness of the rates may be made upon a bill filed to restrain the collection of penalties, or to restrain enforcement of the statute, or may be raised by the carrier in an action to recover penalties, or in a mandamus proceeding to compel compliance with the provisions of the statute, or upon the filing of a bill to restrain the carrier from charging an excessive rate. See concurring opinion of Mr. Justice Miller, in *Chicago, etc., R. R. Co. v. Minnesota* (134 U. S. 460), and *St. Louis & S. F. R. Co. v. Gill* (156 U. S. 649).

In numerous cases, statutes fixing a rate of charge have been declared to be constitutional, although containing no provision for judicial investigation as to the reasonableness of

the rate, or giving the carrier an opportunity to be heard in regard thereto.

Budd v. New York, 143 U. S. 517;
Brass v. North Dakota, 153 U. S. 391;
San Diego Land, etc., Co. v. National City, 174 U. S. 739;
St. Louis & San Francisco R. Co. v. Gill, 156 U. S. 649.

VII.

The burden of the argument of respondent and plaintiff in error is that the enforcement against it of the rate fixed by the statute will deprive it of property without due process of law, and it cites a large number of cases to indicate the protection which the Federal constitution affords to property, that unreasonable rates cannot be established by a statute, and if established, will be relieved against by the courts.

We admit the correctness of the rule laid down by these cases; but insist that they are not applicable to a case where the rate fixed is established by the organic law of the corporation objecting, and constituted a part of that law at the time the corporation was organized. In such a case, the corporation, in order to gain any existence, was obliged to submit to the conditions imposed in the act creating it, and can possess only such rights and powers, and hold them subject to such conditions and limitations, as are fixed by that law. By accepting the provisions of the statute, the corporation, in substance, contracted to carry passengers at the rate fixed in the statute, and that it may have made a contract which it is not to its advantage to carry out, does not relieve it from the burden imposed by the statute.

The respondent also comments upon the fact that the two and one-half cent rate did not become effective until the earnings of the road reached two thousand dollars per mile, and

that the reasonableness of the rate must be determined as of that time. The entire provision relating to the graduated rate was in the law when the respondent incorporated under it, and it contracted, not only that it would presently carry at three cents, but that it would carry at two and one-half cents, when its earnings reached two thousand dollars per mile, and at two cents when its earnings reached three thousand dollars per mile. These conditions it submitted to upon its organization, although the circumstances bringing the particular rate into effect might not exist for a considerable period thereafter.

VIII.

The classification made in the Michigan act, by fixing a graduated rate, based upon earnings per mile, has been passed upon by this court and held valid, in *Chicago & Grand Trunk R. R. Co. v. Wellman* (143 U. S. 339; 83 Mich. 606).

See also,

Railroad Company v. Iowa, 94 U. S. 155;
Dow v. Biedelman, 125 U. S. 680;
Clark v. Titusville, 183 U. S. 329.

We submit, therefore, that the ruling of the State Supreme Court should be affirmed.

CHARLES A. BLAIR,
Attorney General of Michigan.

Of Counsel.

Supreme Court of the United States.

No. 61.—October Term, 1903.

The Grand Rapids and Indiana Railway Company, Plaintiff in Error, *vs.* Chase S. Osborn, Commissioner of Railroads of the State of Michigan.	In error to the Supreme Court of the State of Michigan.

[February 23, 1904.]

This is a writ of error to review a judgment of the Supreme Court of the State of Michigan, which affirmed an order of the Circuit Court of Kent County, Michigan, awarding a peremptory writ of mandamus. By the writ the plaintiff in error was, in effect, commanded to reduce its rates for the transportation of passengers over its lines of railroad from three cents per mile to two and one-half cents per mile, as required by an act of the legislature of Michigan known as Act 202 of the session of 1889.

The Grand Rapids and Indiana Railroad Company was the original owner of the road in question. That company was incorporated under the laws of Michigan and Indiana in 1870, and its line of railroad was constructed and put into operation before January 1, 1873. It also owned and operated in Michigan a number of short branch lines and several leased lines; and its mileage in Michigan exceeded three hundred miles. During the period between the incorporation of the company and the construction of its road railroad companies which were operating in Michigan were authorized to regulate the tolls and compensation to be paid for the transportation in that State of persons and their baggage, but the charge which might be made for such transportation was limited to three cents per mile on roads over twenty-five miles in length. The Michigan statutes also contained provisions authorizing the execution of mortgages and the issue of bonds by railroad corporations. By Act 198, of the session of 1873, the laws relating to railroads were revised, and such revision with amendments is still in force. (Compiled Laws of Michigan, 1897, ch. 164, pp. 1937–2000.) It was therein provided that corporations organized under a prior general railroad law "shall be deemed and taken to be organizations under this act." By subdivision ninth of section 9 of article II the maximum charge which railroad corporations might make for the transportation of passengers and their ordinary baggage on roads exceeding twenty-five miles in length was fixed at three cents per mile. Power was also conferred upon railroad companies to borrow money, issue bonds or other obligations therefor, and to mortgage their corporate property and

franchises, and the income thereof, or any part thereof, as security. Section 2 of article I of the act was as follows:

"In case of the foreclosure and sale of any railroad, or part of any railroad, under any trust deed, or mortgage given to secure the payment of bonds sold to aid in its construction and equipment, or for other cause authorized by law, it shall be competent and lawful for the parties who may become the purchasers, and such others as they may associate with themselves, to organize a corporation for the management for the same, and issue stock in the same in shares of one hundred dollars each, to represent the property in said railroad; and such corporation, when organized, shall have the same rights, powers and privileges as are or may be secured to the original company whose property may have been sold under and by virtue of such mortgage or trust deed. Such organization may be formed by virtue of a declaration or certificate of the purchasers at the sale under said mortgage or trust deed, which shall set forth the description of the property sold, and the date of the deed under which it was sold, or the decree of the proper court, if it shall have been sold by virtue of a decree of any court; and with such description of the parties to the deed or suit as may identify the one or the other, or both; the time of the sale, and the name of the officer who sold the same; and also the purchasers, and the amount paid, and the stockholders to whom stock is to be issued, and the amount of the capital stock and the name of the new corporation, and such other statements as may be found requisite to make definite the corporation whose property may have been sold, and the property sold, as well as the extent of the rights and property of the new company; which said certificate or declaration shall be signed by all of the said purchasers and shall be addressed to the Secretary of State; and being filed and recorded in his office, the said corporation shall become complete, with all the powers and rights secured to railroad companies under this act, to all the provisions of which, and amendments thereto, it shall be subject, and a certified copy of the said certificate or declaration shall be *prima facie* evidence of the due organization of said company."

There was also a general provision that the act might be altered, amended or repealed, but that such alteration, amendment or repeal "shall not affect the rights of property or companies organized under it."

In 1884 the Grand Rapids and Indiana *Railroad* Company executed a second mortgage upon its railroad property to secure an issue of three million dollars of bonds. While this mortgage was in force, and in the year 1889, subdivision ninth of section 9 of article II of the general railroad law of 1873—the section containing an enumeration of powers conferred upon railroad corporations—was amended to read as follows:

"Ninth. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger, and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, shall not exceed the following prices, viz: for a distance not exceeding five miles, three cents per mile; for all other distances, for all companies, the gross earnings of whose passenger trains, as reported to the commissioner of railroads for the year one thousand eight hundred and

eighty-eight, equaled or exceeded the sum of three thousand dollars for each mile of road operated by said company, two cents per mile, and for all companies, the earnings of whose passenger trains reported as aforesaid, were over two thousand and less than three thousand dollars per mile of road operated by said company, two and a half cents per mile, and for all companies whose earnings reported as aforesaid were less than two thousand dollars per mile of road operated by said company, three cents per mile: *Provided*, That in future, whenever the earnings of any company doing business in this State, as reported to the commissioner of railroads at the close of any year, shall increase so as to equal or exceed the sum of two thousand or three thousand dollars per mile of road operated by said company, then in such case companies shall thereafter, upon the notification of the commissioner of railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half, or two cents per mile, as hereinbefore provided: *Provided*, That roads in the Upper Peninsula which report as above provided passenger earnings exceeding three thousand dollars per mile, shall not charge to exceed three cents per mile, and roads reporting less than three thousand dollars per mile shall be allowed to charge not to exceed four cents per mile. . . ."

The mortgage of 1884 was foreclosed; and, in 1896, under decrees of Circuit Courts of the United States, the property covered by such mortgage was sold to John C. Sims, subject to a prior mortgage securing a large issue of outstanding bonds. Sims and his associates subsequently executed the certificate authorized by and complied with all the requirements mentioned in section 2 of article I of the general railroad law of 1873 aforesaid, and by virtue thereof the plaintiff in error came into existence and took control of the railroad property in question. It continued to exact a charge for the transportation of passengers and their ordinary baggage of three cents per mile.

In a statutory report made in 1891 by the plaintiff in error to the commissioner of railroads of Michigan it was represented that the gross earnings in Michigan of the passenger trains on its lines of railroad exceeded $2,000.00 per mile of road operated. Thereupon said commissioner notified plaintiff in error to reduce its rates on passenger traffic to two and one-half cents per mile for distances exceeding five miles. The order not being obeyed, a proceeding in mandamus was instituted to compel compliance. In its answer to the rule to show cause the company specially set up the claim that, so far as it was concerned, the statute was repugnant to the due process and equal protection clauses of the Fourteenth Amendment, and also violated the commerce clause of the Constitution of the United States. It recited the cost to the plaintiff in error of the property indirectly acquired by it under the foreclosure, the amount of outstanding capital stock, the bonded indebtedness of the road and the annual interest on such bonded debt; and represented that the income from passen-

ger traffic which would be received if it put in force the reduced rates would leave but a trifling surplus after deduction of reasonable operating expenses, interest on debt and other fixed charges. It was also averred in support of the charge that the act was repugnant to the commerce clause of the Constitution of the United States, that the gross receipts from passenger traffic in Michigan forming the basis of the proposed reduction in rates included receipts from interstate traffic, and that if such interstate traffic receipts were included the gross receipts would be less than $2,000.00 per mile, and hence the reduced rates would not be enforcible.

On the hearing of the order to show cause it was contended on behalf of the relator that the railroad company, by incorporating under the law which embodied the provisions complained of, thereby entered into a contract with the State to carry passengers at the rate fixed in the statute. By leave a demurrer was filed to the answer, the single ground stated in support thereof being the following:

"That upon its incorporation in 1896 under the general railroad law, the said respondent entered into and became a party to a contract with the State of Michigan, one of the conditions of which is the agreement on the part of said respondent to carry all passengers at the rates fixed by subdivision ninth, section nine of article two of said general railroad law, under which it is incorporated."

The Circuit Court sustained the demurrer, and awarded a peremptory mandamus commanding the railway company to "forthwith and hereafter issue and cause to issued tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, at the rate of two and one-half cents per mile for all distances exceeding five miles." The record by writ of certiorari was removed to the Supreme Court of Michigan. In that court leave was given to add to the demurrer the following additional ground, viz: "2. That upon its incorporation in 1896 under the general railroad law, the said respondent became subject to that law and the provision therein requiring it to carry passengers at the rates fixed in subdivision ninth, section 9 of article II of that law, said provision in regard to rates being one of the conditions of the existence of respondent." Waiving a decision of the first ground of demurrer, the order awarding a peremptory writ of mandamus was affirmed upon the second ground just recited. (130 Mich. .) By writ of error the judgment of affirmance has been brought here for review.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

A jurisdictional question which was raised by the defendant in error requires first to be disposed of. It was objected that the judgment of the

Supreme Court of Michigan in the case at bar was not based upon a Federal question, and hence this court is, it is urged, without jurisdiction to entertain this writ of error. The objection, however, is not well founded. It is plain from the averments of the answer of the railroad company to the petition in mandamus that the company relied upon the provisions of the general railroad law of 1873, authorizing the incorporation of the purchasers of a railroad after sale in the foreclosure proceedings, as constituting a contract protected by the Constitution of the United States. The determination of the alleged estoppel embodied in the ground of demurrer to the answer of the railroad company, and which was sustained by the Supreme Court of Michigan, necessarily involved a consideration of this claim of a contract right, protected from impairment by the Constitution of the United States. In substance, if not in express terms, such question was passed upon by the court below. A Federal question which gives this court jurisdiction therefore arises on the record.

That the section of the general railroad law of 1873, making provision for the creation of a new corporation upon the reorganization of a railroad by the purchaser at a foreclosure sale, did not constitute a contract protected by the Constitution of the United States, is concluded by the decision in *People of the State of New York* v. *Cook*, (148 U. S. 397.) There the purchasers of railroad property in the State of New York under a sale upon foreclosure of a mortgage sought to escape the payment of an incorporation fee laid by the authority of certain statutes of the State of New York enacted after the execution of the mortgage. The claim was made that the statutes of the State of New York authorizing the purchasers of railroads sold upon foreclosure to incorporate, which were in force when the mortgage was executed, constituted a contract between the State of New York and the bondholders and their privies, and that the enforcement of the subsequent statute providing for the payment of an incorporation fee violated the obligation of the alleged contract. The Court of Appeals of New York held to the contrary, and its judgment was affirmed by this court. In the course of the opinion of this court it was said (p. 410):

"The plaintiffs in error acquired the properties and franchises of these corporations, which were subject to the taxing power of the State, after the act of 1886 was passed and went into effect. There is no provision of the law under which they made their purchase requiring them to become incorporated, but desiring corporate capacity they demanded the grant of a new charter under which to exercise the franchises so acquired without compliance with the law of the State existing at the time their application for incorporation was made. We are clearly of the opinion that the act of 1874, as amended in 1876, set up and relied upon by them, does not sustain such a claim. The provisions of that act do not constitute a contract on the part of the State, with either the corporations, or the mortgagees, bondholders, or purchasers at foreclosure sale. They are merely matters of law instead of contract, and the right therein conferred upon

purchasers of the corporate properties and franchises sold under foreclosure of mortgages thereon, to reorganize and become a *new corporation*, is subject to the laws of the State existing or in force at the time of such reorganization and the grant of a new charter of incorporation. (*Memphis & L. R. R. Co.* v. *Berry*, 112 U. S. 609.)"

It results from the foregoing that Sims—the purchaser of the railroad property in question at the sale under foreclosure—and his associates could not demand to be incorporated under the statutes of Michigan as a matter of contract right. Possessing no such contract right, they or their privies cannot now be heard to assail the constitutionality of the conditions which were agreed to be performed when the grant by the State was made of the privilege to operate as a corporation the property in question. Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body. (*Daniels* v. *Tearney*, 102 U. S. 415, and cases cited.) That a railroad corporation may contract with a municipality or with a State to operate a railway at agreed rates of fare is unquestionable. And where the provisions of an accepted statute respecting rates to be charged for transportation are plain and unambiguous, and do not contravene public policy or positive rules of law, it is clear that a railroad company cannot avail of privileges which have been procured upon stipulated conditions and repudiate performance of the latter at will. Whether if a condition in a statute is couched in ambiguous language and is susceptible of two constructions, as it is claimed is the case before us in respect to the basis upon which the gross receipts per mile of operated road was to be calculated, a construction should be adopted which will not render the condition repugnant to the Constitution of the United States, we need not determine. The statute in question, in its entirety, has been construed by the Supreme Court of Michigan and held valid, and its decision as to the proper interpretation of the language of the act in respect to the mode of ascertaining the gross receipts per mile does not render the statute repugnant to the Constitution of the United States, within the ruling recently made by this court in *Wisconsin & Michigan Railway Company* v. *Powers*, (191 U. S. 379.)

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.